Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Petitioners,

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

187 pp

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January 10, 1997

QUESTIONS PRESENTED

1. Whether Congress has displaced dormant Commerce Clause precepts with respect to state hazardous waste programs that are approved by the Environmental Protection Agency under the Resource Conservation and Recovery Act upon satisfaction of a "consistency" test that includes criteria for evaluating effects on interstate commerce, which state programs operate "in lieu" of federal law.

2. Whether South Carolina's neutral cap on disposal of hazardous waste by burial and requirement that the need for a new treatment facility be demonstrated by reference to wastes generated in-state should be sustained, whatever criteria for adjudging effects on interstate commerce are applied.

3. Whether a court, uncertain as to the meaning or application of a federal agency's statutory authority and implementing regulations, should refer issues of their interpretation to the agency under the doctrine of primary jurisdiction.

4. Whether the court of appeals erred in employing an abuse-of-discretion standard rather than a *de novo* standard for review of the district court's denial on legal grounds of a motion for referral under the primary jurisdiction doctrine.

PARTIES TO THE PROCEEDING

The Sierra Club, Energy Research Foundation, Citizens for Clean Air and Water, Environmentalists, Inc., and Citizens Asking for a Safe Environment (CASE) intervened as defendants in this case in the district court. These intervening defendants were also appellants in the court of appeals.

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The State of South Carolina, David M. Beasley, Governor of the State of South Carolina, Douglas E. Bryant, Commissioner of the South Carolina Department of Health and Environmental Control, the South Carolina Department of Health and Environmental Control, and the South Carolina Board of Health and Environmental Control ("South Carolina" or "the State"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 98 F.3d 774. *App.* 1a. The opinion of the district court is reported at 901 F. Supp. 1026. *App.* 28a.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3, provides that "The Congress shall have Power . . . To regulate Commerce . . . among the several States."

Section 3006 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6926 (1995), is set out in the Appendix at 105a-107a. Paragraph 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9604 (c)(9) (1995), is set out in the Appendix at 108a. The Environmental Protection Agency's "consistency" regulation, 40 C.F.R. § 271.4 (1995), is set out in the Appendix at 109a.

South Carolina Acts No. 196 of 1989 and No. 590 of 1990, Executive Orders Nos. 89-17 and 89-25, and Department of Health and Environmental Control Regulation 61-99 are set out in the Appendix at 125a-147a.

STATEMENT

Exercising its power under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Congress enacted the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §§ 6901-6992k (1995), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"),

42 U.S.C. §§ 9601-9675 (1995), to address treatment, storage, and disposal of hazardous wastes and remediation of contamination from hazardous substances and constituents, respectively. Both RCRA and CERCLA contemplate that States will establish counterpart regulatory programs. RCRA explicitly provides that State programs for regulating hazardous wastes, if "consistent" with the Federal and other State programs, shall, upon approval by the Environmental Protection Agency ("EPA"), operate "in lieu" of the Federal program. RCRA § 3006, 42 U.S.C. § 6926(b).

The court of appeals' decision in this case invalidated on dormant Commerce Clause grounds a set of laws and rules that are part of South Carolina's hazardous waste regulatory program. The court of appeals struck down these laws and rules notwithstanding the fact that South Carolina's program has been approved by EPA and thus has been found to satisfy the statutory standard of consistency established by Congress in RCRA and defined and implemented by EPA. Despite this Court's precedents to the contrary, the court of appeals concluded that a federal agency's implementing regulations and its actions under those regulations are not to be considered in deciding whether a federal statute has displaced the dormant Commerce Clause. The court's application of dormant Commerce Clause analysis to South Carolina's program, even though it was approved by EPA under the RCRA standard, contravenes Congress' mandate that interstate issues respecting hazardous waste regulatory programs be addressed through RCRA, by EPA. In effect, the court of appeals held that state laws which are approved by a federal agency under a federal statute can nonetheless be struck down by the courts under the dormant Commerce Clause, an unprecedented and impermissible result.

Moreover, the court of appeals struck down two provisions, a neutral cap on total amounts to be landfilled and a "needs" regulation, that match ones that have been expressly approved by this Court as permissible under

the dormant Commerce Clause. Whatever standard is applied for evaluating effects on interstate commerce, whether derived from federal statute or dormant Commerce Clause jurisprudence, the court's conclusion on these provisions is improper and should be set aside.

The federal regulatory regime.

RCRA is a comprehensive federal statute governing identification, listing, treatment, storage, transportation, and disposal of hazardous wastes. In enacting RCRA, Congress provided that States might develop their own programs to regulate such wastes. RCRA § 3006, 42 U.S.C. § 6926(b). RCRA subjects such programs to a standard of "consistency": to be approved by EPA, each State's RCRA program must be "consistent with the Federal or State programs applicable in other States." *Id.* State programs that are approved by EPA under this consistency requirement operate "in lieu of the Federal program." *Id.* Thus, an approved state program operates in place of and with the force of federal law. RCRA § 3006, 42 U.S.C. § 6926(d).

EPA is responsible for implementing RCRA's statutory mandates. EPA's regulations for authorization of state programs, set out in 40 C.F.R. Part 271, specify "the procedures EPA will follow in approving, revising, and withdrawing approval of State programs and the requirements State programs must meet to be approved by the Administrator under sections 3006(b), (f) and (h) of RCRA." 40 C.F.R. § 271.1(a). In accord with RCRA § 3006, EPA's regulations provide that the Agency must authorize a state program unless it is found inconsistent with either the federal program outlined in RCRA or the programs already approved in other States. 40 C.F.R. §§ 271.1(e), 271.4.

Subsection (a) of the "consistency" provisions in 40 C.F.R. § 271.4 prescribes a "reasonableness" test for judging effects of a State's program on movement of

hazardous waste in interstate commerce. *App.* 109a. Specifically, "[a]ny aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States . . . shall be deemed inconsistent" and thus not in compliance with RCRA § 3006. 40 C.F.R. § 271.4(a). EPA adopted this "reasonableness" test under RCRA after giving explicit consideration to statutory "consistency" requirements, *see* 45 *Fed. Reg.* 33,290, 33,395 (May 19, 1980), and taking account of precedents interpreting the "dormant" Commerce Clause. *Id.*

Congress has also addressed interstate waste disposal issues under the ambit of CERCLA. In 1986, Congress added paragraph 104(c)(9) to CERCLA to address the reluctance of some States and localities to permit construction of new hazardous waste treatment and disposal facilities. Paragraph 104(c)(9) requires each State to "assure the availability of hazardous waste treatment or disposal facilities" for all hazardous wastes generated *within* such State over the coming twenty years. CERCLA § 104(c)(9), 42 U.S.C. § 9604(c)(9). The facilities may be either "within the State or outside the State in accordance with an interstate agreement or regional agreement or authority." *Id.*

EPA coordinated the implementation of this capacity-assurance provision of CERCLA with EPA's regulatory regime under RCRA. Particularly, EPA decided to use the process by which Capacity Assurance Plans are developed, evaluated, and approved as the primary means of addressing "State actions which may be inconsistent with the federal Resource Conservation and Recovery Act program." Policy Mem. (Dec. 23, 1988), *App.* 123a. As a result, the RCRA state-authorization withdrawal process is to be used secondarily only "after determining that the CERCLA process has proven ineffective." *Id.*

South Carolina's corresponding regulatory program.

In 1985, EPA granted South Carolina authorization under RCRA § 3006 to operate its own hazardous waste program in lieu of the federal program.[1] *See* 50 *Fed. Reg.* 46,347 (November 8, 1985), *App.* 110a. In doing so, EPA explained its use of the "consistency" regulation. *Id.* at 46,438-440, *App.* 116a-122a. EPA noted that although Section 271.4(a) had some roots in dormant Commerce Clause standards, *e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the "Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here." 50 *Fed. Reg.* at 46,439, *App.* 117a. EPA disagreed "that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable." *Id.* (emphasis in original). Instead, EPA determined that RCRA requires "all relevant factors" to be considered in assessing the permissibility of state hazardous waste laws with interstate effects. *Id.*

With the advent, in 1986, of the federal capacity-assurance requirements under CERCLA, South Carolina made adjustments to its then-recently-approved program. South Carolina was and still is one of the few States which have large existing hazardous waste treatment and disposal facilities. Consequently, South Carolina has borne the brunt of the failure of other States to provide adequate, or in some cases, any, commercial treatment and disposal ca-

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[1] EPA's application of the consistency requirements in Section 271.4 to South Carolina's RCRA program required resolution of a challenge by the Hazardous Waste Treatment Council, respondent in this case (which has since changed its name), to the moderately higher fee South Carolina sought to impose on disposal of out-of-state waste. At issue was whether the disparate fee schedule was unconstitutional and whether it complied with Section 271.4(a). EPA determined that the different fee schedule was not unreasonable, and South Carolina's hazardous waste program including the fee schedule was approved on November 8, 1985. 50 *Fed. Reg.* at 46,438-440, *App.* 116a-122a.

pacity for hazardous wastes. In developing its Capacity Assurance Plan, South Carolina had to provide for its own wastes, allocate capacity for out-of-state wastes that the State accepted under an interstate or regional agreement,[2] and assure that the existing permitted capacity was not exhausted by demands from States that did not provide disposal capacity for their wastes or enter into appropriate agreements. To deal with these issues, South Carolina revised its EPA-approved hazardous waste regulatory program in three respects pertinent to this litigation.

The first adjustment was made in Act No. 196 of 1989. *App.* 125a. Section 9 of that Act prohibited the treatment, storage, or disposal in South Carolina of hazardous waste generated in a State that both (1) prohibited the treatment, storage, or disposal of such waste, and (2) "ha[d] not entered into an interstate or regional agreement for the safe" treatment, storage, or disposal in another State. Act No. 196, § 9, amending S.C. Code Ann. § 44-56-130, *App.* 127a.[3] There was no requirement that the regional agreement be one to which South Carolina was a signatory. *Id.*[4]

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[2] In October 1989, South Carolina joined the States of Alabama, Kentucky, and Tennessee in a SARA Capacity Assurance Regional Agreement. In November of 1989, the State of North Carolina was added to that Regional Agreement, but North Carolina did not fulfill its commitments under the Agreement and it was automatically removed from the Agreement as a consequence. In the Regional Agreement, the Party States committed to provide specific facilities that the States needed to make up deficits in treatment and disposal capacity for particular types of waste.

[3] Section 5 of Act No. 196 expressed a nondiscriminatory, precatory "preference" for the disposal of in-state waste at facilities within the State. *Id.* § 5, adding S.C. Code Ann. § 44-56-205.

[4] Act No. 196 superseded and partially codified Executive Order No. 89-17, which provided that permitted disposal facilities in the State were not to accept hazardous wastes generated in another State where the waste was banned or prohibited from disposal in that State by law or regulation, *and* where South Carolina had no interstate or regional agreement with such State. Executive Order

The second adjustment was made to South Carolina's neutral cap on land disposal of hazardous waste. At the time, South Carolina had authorized disposal of up to 135,000 tons of hazardous waste per year at commercial land-disposal facilities in the State. S.C. Code Ann. § 44-56-60(a). In accord with RCRA's mandate to reduce landfill disposal whenever possible, *see* 42 U.S.C. §§ 6901(b)(7)-(8), 6924, the State legislature enacted Act No. 590 of 1990 to provide for a phased decrease in the amount of hazardous waste disposed of in landfills. *App.* 129a. The existing statutory authorization of 135,000 tons was reduced to 120,000 tons effective July 1, 1990, and to 110,000 tons effective July 1, 1991. *App.* 131a. In addition, each disposal facility was to reserve at least the same capacity used during the previous year for disposal of hazardous waste generated in-state.[5]

Third, Department of Health and Environmental Control ("DHEC") Regulation 61-99 became effective January 12, 1990. *App.* 134a. This rule, commonly called the "needs regulation," requires that an applicant seeking a permit to expand an existing treatment facility or to build a new facility shall demonstrate a need for the increased capacity. For purposes of demonstrating the defined amount of "need," out-of-state hazardous waste is not included in the applicant's calculations. DHEC Reg. 61-99, § III(C), *App.* 136a.

No. 89-17 also established a preference for disposal of waste generated within South Carolina.

[5] Act No. 590 also provided that the amount of waste disposed of in the State could exceed the specified limit if the South Carolina Department of Health and Environmental Control ("DHEC") determined that (1) an increase in disposal of waste from a particular in-state site was "necessary to protect the health and safety" of the South Carolina citizenry, or (2) at least 110,000 tons of in-state waste was disposed of by land in the State during the previous year. This Act superseded Executive Order No. 89-25.

South Carolina's Capacity Assurance Plan was timely submitted to EPA on October 17, 1989. Each of the legislative, executive, and regulatory actions at issue here was included in the Plan or was projected for inclusion.[6] The SARA Capacity Assurance Regional Agreement to which South Carolina was a party, *see supra*, p. 7 n.2, was also included as part of South Carolina's Plan.

After preliminarily reviewing South Carolina's Capacity Assurance Plan, EPA requested that South Carolina address whether the limitations of Executive Order No. 89-17 and Act No. 196 satisfied the RCRA "consistency" requirement. Letter from Greer C. Tidwell, EPA Regional Administrator for Region IV, to Michael D. Jarrett, Director of South Carolina Department of Health and Environmental Control (July 6, 1989). South Carolina responded with a formal Opinion of its Attorney General that the provisions were consistent with federal law and did not violate the Commerce Clause. Opinion by T. Travis Medlock, Attorney General (August 23, 1989). EPA thereafter approved the Plan and commended the State for its efforts. Letter from Greer C. Tidwell, EPA Regional Administrator for Region IV, to the Hon. Carroll A. Campbell, Jr., Governor of South Carolina (May 10, 1990).

Thereafter, in 1995, EPA issued a notice that it had made a final decision approving South Carolina's hazardous waste regulatory program under RCRA in all respects. 60 *Fed. Reg.* 42,046 (Aug. 15, 1995).

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[6] Executive Orders Nos. 89-17 and 89-25 and Act No. 196 were included in the submission. Regulation 61-99 was then a proposed permanent regulation. In the submission South Carolina advised EPA that legislation was expected to be passed which would enact into law quantitative disposal limits reflecting the amounts specified in Executive Order No. 89-25. This was effectuated in Act No. 590.

This litigation.

On June 27, 1990, respondent Environmental Technology Council ("ETC"), then named the Hazardous Waste Treatment Council, filed suit against South Carolina in federal district court, seeking declaratory and injunctive relief primarily based upon claims that Act No. 196 of 1989, Act No. 590 of 1990, and DHEC Reg. 61-99 violated the Commerce Clause, U.S. Const. art I, § 8, cl. 3.[7] On January 11, 1991, by a Preliminary Injunction and Order, the district court "declar[ed] invalid" and enjoined enforcement of the South Carolina laws, executive orders, and regulations that had been put at issue. *Hazardous Waste Treatment Council v. South Carolina,* 766 F. Supp. 431 (D.S.C. 1991), *App.* 80a. Appeal was taken to the United States Court of Appeals for the Fourth Circuit, which, assessing ETC's claims under the preliminary injunction standard of *Blackwelder Furniture Co. v. Seilig Mfg. Co.,* 550 F.2d 189 (4th Cir. 1977), held that the "likelihood of irreparable harm to the plaintiff" would be "measurably greater" if the injunction were denied. *Hazardous Waste Treatment Council v. South Carolina,* 945 F.2d 781, 795 (4th Cir. 1991) (*"HWTC"*), *App.* 50a, 78a. The court of appeals thus affirmed entry of the preliminary injunction, while remanding to the district court with instructions for modification to strike the words implying a declaration of invalidity and to narrow the preliminary injunction in specified respects. *See id.* at 787 n.9, 795, *App.* 63a, 78a.

The court of appeals' opinion in *HWTC* was rendered on September 20, 1991, and the mandate issued on October 21, 1991. On November 21, 1991, South Carolina filed a motion requesting the district court to conform its preliminary injunction to the court of appeals' mandate. Shortly thereafter, in light of the uncertainties expressed

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[7] Jurisdiction of Hazardous Waste Treatment Council's complaint was predicated upon 28 U.S.C. § 1331.

by the court of appeals regarding the proper application of the consistency provisions of RCRA § 3006 and 40 C.F.R. § 271.4,[8] South Carolina moved for a stay of the proceedings and referral of such questions to EPA's primary jurisdiction. ETC contested this motion and on February 3, 1992 moved for summary judgment on its Commerce Clause claims. The district court heard argument on ETC's motion for summary judgment on April 30, 1992.[9]

Nearly three years later, on April 13, 1995, the district court entered its Findings of Fact, Conclusions of Law, and Order (1) denying South Carolina's motion to refer the RCRA-consistency issue to EPA's primary jurisdiction, (2) granting ETC's motion for summary judgment on its Commerce Clause claims and entering a permanent injunction against the challenged provisions, and (3) denying as moot South Carolina's motion to conform the preliminary injunction to the court of appeals' 1991 mandate. *App.* 49a. South Carolina filed a timely appeal.

On October 15, 1996, the court of appeals issued an opinion affirming the district court's summary judgment. In holding that the dormant Commerce Clause provided the standard applicable to this case, the court said there was an "absence of a clear Congressional statement authorizing discrimination," *Environmental Technology Council*

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[8] In its 1991 decision, the court of appeals reviewed RCRA § 3006 and EPA's implementing regulation and explicitly noted its uncertainty:

> We are still unsure, however, of whether EPA was attempting to state (1) that some disparities [in treatment of in-state and some out-of-state wastes] might be constitutional, (2) that even if the disparities would be unconstitutional, EPA could approve the programs as "consistent," or (3) that EPA had the authority to permit otherwise unconstitutional state actions.

945 F.2d at 794, *App.* 76a.

[9] Subsequent hearings were held on August 5 and September 20, 1994.

v. Sierra Club, 98 F.3d 774, 783 (4th Cir. 1996), *App.* 15a. The court of appeals accorded no weight to EPA's implementing regulations in this regard, holding that "[e]ven if EPA had expressly approved the laws in question, we could not do so without express congressional authorization." *Id.* at n.17, *App.* 17a. The court of appeals addressed the neutral cap and the needs regulation along with the other aspects of the challenged laws for purposes of its analysis, notwithstanding the circumstance that these two provisions set overall limits on disposal capacity not dependent on the origin or source of the waste. Broadly characterizing the neutral cap and needs regulation as part of a program that "favors in-state interests over out-of-state interests," the court of appeals struck down the "overall limit[s]" as "discriminatory." 98 F.3d at 788, *App.* 24a. Finally, reviewing for abuse of discretion the district court's decision not to refer this case to EPA's primary jurisdiction, the court of appeals characterized the question to be referred as "whether South Carolina's laws are constitutional," and concluded that "[t]he EPA's special expertise is not needed to decide a question of law in a constitutional matter." *Id.* at 789, *App.* 27a.

REASONS FOR GRANTING THE PETITION

This case raises important questions regarding whether dormant Commerce Clause criteria are supplanted by a comprehensive federal regulatory regime that authorizes approved state programs to operate for federal as well as state purposes. The court of appeals struck down on Commerce Clause grounds South Carolina laws and rules that were approved by EPA under a federal regulatory regime that includes a review for effects on interstate commerce as part of the statutory approval process. Because EPA's approval of South Carolina's laws and rules meant that South Carolina's program operated "in lieu" of federal law, 42 U.S.C. § 6926(b), the court of appeals

in effect used the dormant Commerce Clause to invalidate federal law.

This case thus squarely presents the important question, identified but pretermitted (because not raised below) in *Chemical Waste Management v. Hunt*, 504 U.S. 334, 346 n.9 (1992), of whether the RCRA consistency standard and federal approval under that standard displace the dormant Commerce Clause. In resolving that issue in this case, the court of appeals refused to give effect to a series of precedents of this Court holding that an administrative agency's construction of a federal statute, and of its own regulations implementing that statute, has a direct bearing on whether dormant Commerce Clause criteria are in fact supplanted. *E.g., Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Apart from RCRA, the decision in this case is significant for a number of other federal-state regulatory programs that follow the pattern exemplified by RCRA. In refusing to give weight to the approval of a federal agency—and to the criteria adopted by the agency—the court of appeals' decision in this case calls into question the validity of EPA-approved hazardous waste regulatory programs in operation in a number of States, and, more generally, undermines a basic federal-state regulatory model employed by Congress.[10]

In addition, contrary to this Court's guidance in *Chemical Waste Management*, the court of appeals refused to

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[10] In the area of *solid* waste regulation, which unlike hazardous waste regulation Congress has largely left to states and localities, challenges to state and local laws under the dormant Commerce Clause have been frequent. *See C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992).

uphold two provisions, the neutral cap and the needs regulation, which place "an evenhanded cap on the total tonnage landfilled" in the State. 504 U.S. at 345. Under either the RCRA consistency standard or a dormant Commerce Clause standard, the court of appeals erred in striking down provisions which regulated overall waste disposal through neutral means.

Finally, the court of appeals wrongly approved the district court's refusal to refer questions of the interpretation and application of the RCRA "consistency" standard and EPA's "reasonableness" regulations to the Agency under the primary jurisdiction doctrine. 98 F.3d at 789, *App.* 27a. The court did so despite its observations that "EPA's position on what constitutes 'reasonableness' has changed over time," *id.* at 783, *App.* 14a, and "EPA has taken seemingly contradicting positions at different times on how it will apply and interpret the consistency requirement." *Id.* at 783 n.14, *App.* 14a. The court of appeals achieved this result notwithstanding the open questions of statutory and regulatory interpretation and application by simply assuming that those questions did not matter because a constitutional question of law was at issue. *Id.* at 789, *App.* 27a. This approach to the primary jurisdiction doctrine in a Commerce Clause case is wrong. A dormant Commerce Clause question arises at all only if the pertinent federal statutes do not sanction the State's law at issue. EPA is charged by statute with implementing the laws that are at issue in that regard in this case. As to the primary jurisdiction doctrine, the court of appeals' decision is contrary to *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973) (ruling that reference should be made to Commodity Exchange Commission of questions concerning rules adopted under Commodity Exchange Act, where underlying claims were brought under antitrust laws), and to *dicta* in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366 n.10 (1994), and is in conflict with *Massachusetts v. Black-*

stone Valley Elec. Co., 67 F.3d 981 (1st Cir. 1995) (vacating partial summary judgment entered by district court and ordering referral to EPA of "legal" question whether ferric ferrocyanide is a "cyanide" within the meaning of EPA regulations).

A. Congress' Exercised Commerce Power

The Constitution's grant to Congress of the power to regulate commerce among the several States prohibits by implication State actions that burden interstate commerce, at least where the matters have not been addressed by a federal statute. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 143 (1852). The dormant Commerce Clause, however, is but "a limitation on the power of the States," *South-Central Timber*, 467 U.S. at 87, and, by exercising its power under the Commerce Clause, Congress may "permit the states to regulate . . . commerce in a manner which would otherwise not be permissible," *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). *See Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). To be effective, such authorization must be "unmistakably clear" from the plain meaning of the statute or regulations involved, or from independent evidence of congressional intent. *South-Central Timber*, 467 U.S. at 91. Where federal law "unmistakably" creates a standard different from those of the dormant Commerce Clause, the dormant Commerce Clause no longer applies, and the challenged state laws are tested by the requirements of the pertinent federal statute or regulation.

1. *RCRA.*

As a result of the enactment of RCRA and amendments to CERCLA, "the commerce power of Congress is not dormant, but has been exercised by that body," *Northeast Bancorp,* 472 U.S. at 174, and the dormant Commerce Clause standards have been displaced by statutory ones. In RCRA, Congress established a comprehensive scheme for the regulation of hazardous wastes, and provided that States may operate their own programs in place of the federal program if the state program meets the statutory standard of consistency. In addition to specifying the standard by which state programs are to be measured, Congress provided procedures for federal review, by EPA, of proffered state programs.

Implementing RCRA's mandate, EPA adopted regulations to flesh out the federal approval process, and in doing so, expressly considered the effects that state regulation might have on interstate commerce. EPA interpreted and applied the RCRA consistency standard as creating a federal standard distinct from those of the dormant Commerce Clause. In its regulations, EPA prescribed a multi-factored "reasonableness" test by which state programs are to be measured for consistency and expressly rejected any notion that the dormant Commerce Clause would supply the standard of reasonableness.

By creating a statutory standard of consistency and by providing that state programs deemed "consistent with the Federal or State programs applicable in other States" shall be approved and operate "in lieu of" federal law, RCRA § 3006, 42 U.S.C. § 6926(b), Congress has expressed its intention to exercise its Commerce Clause power and to create a statutory standard for adjudging state programs. Congress has manifestly not left the nation's policy respecting interstate movement in hazardous wastes to be addressed under a "dormant" standard. The legislative history of RCRA is explicit that Congress was well aware that hazardous waste management in-

volved the potential for interstate conflicts and that it intended for such issues to be addressed under the RCRA statutory scheme. The House Report of the bill that became RCRA noted that:

> [t]he fact that waste itself is in interstate and intermunicipal commerce has raised a number of problems. (Generally, hazardous waste is more likely to be the subject of interstate transportation than is nonhazardous industrial or municipal waste.) Several jurisdictions, including some states, have attempted to prohibit the importation of waste.

H.R. Rep. No. 1491, 94th Cong., 2d Sess. 10 (1976). Congress intended the consistency requirement under Section 3006(b) to address disparities in state programs and the consequent effects on interstate commerce:

> The general purpose of having federal minimum standards for hazardous waste disposal, with the option of state implementation of state programs equivalent to the federal program, is (1) it provides uniformity among the states as to how hazardous wastes are regulated, (2) it provides industry and commercial establishments that generate such wastes uniformity among states, (3) by providing such uniformity a state with environmentally sound laws does not drive business out of the state to a state which, for economic reasons, decides to be a dumping ground for hazardous wastes . . . .

Id. at 30. In exercising its Commerce Power to create a statutory standard of consistency, Congress displaced the "dormant" Commerce Clause.

In this vein, Congress empowered EPA to develop and implement regulations for RCRA that would ensure consistency with the federal program and among state laws. Using that authority, EPA has implemented the statutory consistency requirement by adopting 40 C.F.R. § 271.4. Under RCRA as applied by EPA, only an aspect of a state program which "*unreasonably* restricts, impedes,

or operates as a ban" on interstate movement of hazardous waste "shall be deemed inconsistent" and thus not permitted by federal law. 40 C.F.R. § 271.4(a) (emphasis added). In implementing this regulation, EPA rejected the suggestion that "RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the [dormant Commerce Clause] Constitutional test as the test for consistency or unreasonable restrictions or impediments." 50 *Fed. Reg.* at 46,439, *App.* 118a. Indeed, EPA requires that "all relevant factors"—not just the existence of burdens—be considered in assessing the permissibility of state laws with interstate effects. *Id.*[11] The RCRA consistency standard, as implemented by EPA, thus displaces the dormant Commerce Clause with respect to approved state programs for hazardous waste disposal. *South-Central Timber,* 467 U.S. at 91.

2. *CERCLA.*

The governing nature of RCRA's consistency provisions regarding interstate effects is specifically reinforced by capacity assurance requirements adopted by Congress as amendments to CERCLA in 1986. As noted *supra,* p. 5, CERCLA § 104(c)(9) requires States to provide assurances "deemed adequate by the President" of the "availability of hazardous waste treatment or disposal facilities" sufficient for the State's requirements over the next twenty years. The facilities must be "within the State or outside the State in accordance with an interstate agreement or regional agreement or authority." 42 U.S.C. § 104(c)(9)(B).

The "unmistakably clear" import of this requirement is that States such as South Carolina may—in fact, must—

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[11] EPA recognized that state requirements "may have some adverse effect on interstate commerce." 50 *Fed. Reg.* at 46,439, *App.* 118a. Construing the mandates of RCRA §§ 3006 and 3009, EPA concluded that not every "disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable" or unlawful. *Id.*

"interfere" with interstate commerce in hazardous waste disposal capacity. For a State meaningfully to assure EPA that disposal capacity will be available for *its* wastes, it can and must address the existence and use of such facilities within the ambit of regional agreements.

The legislative history of paragraph 104(c)(9) demonstrates Congress' intent to authorize States to interfere with interstate commerce as necessary to comply with the new provision. Congress expressly approved "[u]se of *binding agreements* through interstate compacts *guaranteeing access* to a facility" as "one example of how a State may provide the requisite assurances." S. Rep. No. 11, 99th Cong., 1st Sess. 22 (1985) (emphasis added). If a State were to be forbidden under the dormant Commerce Clause from putting limits on access to its facilities by another State, it could not enter into such binding agreements. It could not *guarantee* access for waste from States party to regional agreements without being able to restrict access for waste from others. As Congress recognized, such restrictions will inescapably burden interstate commerce. Accordingly, in marked contrast to cases such as *C&A Carbone, supra,* Congress' direction that States enter into agreements which will guarantee access to appropriate facilities plainly constitutes a finding that "the unobstructed flow of interstate commerce itself is unable to solve the local problem," 511 U.S. at 393, involved in siting of hazardous waste facilities.

3. *The effect of EPA's regulations.*

Its attention gripped by the "Constitutional" nature of the issues in this case, the court of appeals gave short shrift to the interstate-effects aspects of the RCRA "consistency" standard. In this regard, the court of appeals refused to credit EPA's contrary conclusion—adopted as law in Section 271.4—that RCRA *does* create a distinct standard of "reasonableness" which is more permissive

than the dormant Commerce Clause.[12] It acknowledged the conflicting "reasonableness" standard, but "reject[ed] . . . South Carolina's argument that EPA's reasonableness standard should displace a constitutional dormant Commerce Clause analysis." 98 F.3d at 783, *App.* 14a. The court of appeals opined that, "[e]ven if EPA had expressly approved the laws in question, we could not do so without express congressional authorization." *Id.* at 784 n.17, *App.* 17a. This view of the Agency's role in the federal system is plainly at odds with the particular statute at issue and with this Court's jurisprudence.

For example, in *Merrion v. Jicarilla Apache Tribe, supra,* this Court rejected a dormant Commerce Clause challenge brought by oil and gas producers against a severance tax imposed by the Jicarilla Apache Tribe on oil and gas extracted from tribal lands. This Court held that because the tax had "received the requisite approval from the Secretary [of the Interior]" acting pursuant to his regulatory authority, the tax was insulated from dormant Commerce Clause review. 455 U.S. at 155. The Court based that holding on the federal approvals required by the Indian Reorganization Act, 25 U.S.C. §§ 476, 477. The cited provisions did not specifically mention taxing authority; rather, they provided broadly that changes in an Indian Tribe's constitution (which had been necessary to authorize the severance tax) had to receive federal approval. *Merrion* thus relied not on any evidence of Congressional intent respecting the burdens of the tax on interstate commerce, but on the fact that the tax had received a federal sanction by an agency. "Congress ha[d] affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can

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[12] The court of appeals therefore also did not consider that the CERCLA capacity assurance process would be a factor in applying the "reasonableness" criterion.

take effect," and thus the federal commerce power had been exercised. 455 U.S. at 155.[13]

This Court looked to a federal agency's implementing regulations to displace the dormant Commerce Clause in *White v. Massachusetts Council of Constr. Employers, supra.* *White* involved a dormant Commerce Clause challenge to an executive order by the City of Boston requiring all construction projects receiving federal funds administered by the City to be "performed by a work force consisting of at least half bona fide residents of Boston." 460 U.S. at 206. The discriminatory spending of federal funds in favor of city residents was upheld on the rationale that "the order was affirmatively sanctioned by the pertinent *regulations*" governing use of the federal funds at issue. *Id.* at 215 (emphasis added). The applicable federal statutes did not specifically address local favoritism; the Court noted only a general goal of assisting "the poor, minorities, and unemployed." *Id.* at 213. Effective federal authorization was found, however, in the Department of Housing and Urban Development's implementing regulations, which permitted "the type of parochial favoritism expressed in the order." *Id.*

White reinforces the conclusions drawn in *Merrion*: in determining whether a statute displaces dormant Commerce Clause restrictions, the regulations and interpretive guidance of an agency charged with administering that

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[13] The Court explained that as a result of its approval by the Secretary—

> this tribal tax comes to us in a posture significantly different from a challenged state tax, which does not need specific federal approval to take effect, and which therefore requires, in the absence of congressional ratification, judicial review to ensure that it does not unduly burden or discriminate against interstate commerce. Judicial review of the Indian tax measure, in contrast, would duplicate the administrative review called for by the congressional scheme.

455 U.S. at 155-56. *See also Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373-74 n.20 (1994).

statute must be given effect. This Court adhered to such an approach in *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159 (1985). In *Northeast Bancorp*, the issue was whether the Douglas Amendment to the Bank Holding Company Act of 1956, 12 U.S.C. § 1842(d), which prohibited the Federal Reserve Board from approving an acquisition by a bank or bank holding company located in one state of a bank located in another, unless the acquired bank's state laws permitted such acquisitions, also permitted a state to permit such cross-border acquisitions selectively, depending on reciprocity from other states. In considering a proposed acquisition, the Board had held that such selective lifting of the ban was authorized by the Douglas Amendment. Citing the Board's status as "an authoritative voice on the meaning of a federal banking statute," this Court agreed with the Board and held that the dormant Commerce Clause had been displaced. 472 U.S. at 168. EPA's application of the RCRA consistency standard is no less authoritative, and should have been given similar deference here.

In other words, under *South-Central Timber* it is not "Congressional intent" expressed solely in terms of legislative history, but *federal law*, that must authorize the State's laws in an "unmistakably clear" fashion. Here, both Congress and EPA have acted under the power granted by the Commerce Clause in creating the RCRA consistency standard and the "reasonableness" test of Section 271.4(a)—Congress directly and EPA by statutory authorization. EPA's application of the consistency standard of RCRA is unchallenged here and there is no reason why it should not be given effect as arising from the *exercise* of the Commerce Clause power. The court of appeals' holding to the contrary consigns the RCRA consistency standard as applied by EPA to a netherworld: despite ostensibly being valid federal law, it has been accorded no actual effect on the very interstate relation-

ships it aims to address. *Merrion, White,* and *Northeast Bancorp* do not permit such a result.

Moreover, under RCRA and CERCLA Congress has, in addition to adopting a substantive standard at odds with that of the dormant Commerce Clause, also "affirmatively acted by providing a series of federal checkpoints that must be cleared" before a state law can receive federal authorization. *Merrion,* 455 U.S. at 155. In stating that Congress had not provided federal checkpoints, 98 F.3d at 784, *App.* 16a, the court of appeals ignored EPA's approval of South Carolina's capacity assurance plan in 1990, *see supra,* at 9, and its approval of South Carolina's hazardous waste program in a series of actions over several years, culminating in full approval in 1995, *see supra,* at 6, 9. EPA gave its approval of the capacity assurance plan only after first looking explicitly at effects on interstate commerce. *See supra,* at 9.[14]

For RCRA, EPA's rules contemplate that the Agency may undertake review at any time, either acting *sua sponte* or on petition "from an interested person." 40 C.F.R. § 271.23(b)(1) (procedures for withdrawing approval of State programs). Thus, RCRA provides explicit checkpoints because the "consistency" test must be met and a dissatisfied person has appropriate means—action before the Agency and judicial review—to insure that the test has been satisfied. As in *Merrion,* independent judicial invocation of dormant Commerce Clause analysis would

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[14] EPA did not look at such effects when it gave RCRA approval in 1995 to the full South Carolina program, including the provisions at issue here. Thus, while the court of appeals was wrong when it said that "EPA has not expressly approved any of the contested South Carolina laws," 98 F.3d at 784, *App.* 17a, it was correct in the sense that in EPA's 1995 approval the Agency did not focus on interstate effects. EPA obviously did focus on such effects in giving its approval in 1990 to the provisions submitted as part of the State's capacity assurance program, *see supra,* at 9, and, under EPA's policy, that approval served as a first-stage blessing for purposes of the RCRA consistency process, *see supra,* at 5.

be "duplicative" if not contradictory, and EPA's approval should be given effect until it is removed.[15]

4. ***Synopsis.***

The courts should not strike down what EPA elects to approve in valid pursuit of its congressional mandate to regulate hazardous waste. Given EPA's approval under RCRA and CERCLA, the notion that Congress' Commerce Clause power nonetheless still lies "dormant" with respect to the challenged provisions is unsupportable. South Carolina's EPA-approved laws and rules cannot be challenged under the dormant Commerce Clause any more than could action taken by the federal agency itself.[16]

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[15] Cases in which the Court has held that the exercise of Congress' Commerce Clause power has not been sufficiently clear to insulate a state provision from dormant Commerce Clause review involve nothing like the present context. In *South-Central Timber, supra*, Alaska's discriminatory requirement that timber sold from state lands be processed locally was rejected. Although a federal statute created a similar policy with respect to federal lands, it did not address state laws in any respect. Thus, the reason the Court found no "unmistakably clear" intent by Congress to displace dormant Commerce Clause restrictions was that the federal statute had no bearing on the state program. 467 U.S. at 92-93. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982), involved New Hampshire's attempt to prohibit exportation of hydroelectric power on the basis of a "savings clause" in the Federal Power Act which preserved the States' "lawful authority now exercised over the exportation of hydroelectric energy." The Court held that the clause only preserved *already valid* authority—*i.e.* authority exercised within the limits of the dormant Commerce Clause. *Id.* In *Sporhase v. Nebraska*, 458 U.S. 941 (1982), Nebraska defended its prohibition against extraction of its groundwater for use outside the State without citing any directly relevant statute, but rather it simply relied on "37 statutes in which Congress has deferred to state water law, and on a number of interstate compacts dealing with water." *Id.* at 958. Accordingly, the Court found no direct "indicat[ion] that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 960.

[16] The regulatory model used by Congress under RCRA—enactment of federal minimum standards with provisions allowing

The present case thus squarely presents an instance of Congressional authorization—through the adoption of the competing RCRA standard—which has been absent from prior cases before this Court. For example, in *C&A Carbone, supra,* which involved a municipality's "flow control" ordinance directing solid non-hazardous waste to a local facility, Justice O'Connor's concurring opinion noted Congress' "delegation . . . to EPA of authority to assist local government in solving waste supply problems," 511 U.S. at 409-410 (O'Connor, J., concurring), but concluded that EPA's regulations merely echoed the dormant Commerce Clause's requirement of "free and unrestricted movement" of waste. *Id.* Similarly, in *Northwest Airlines, Inc. v. County of Kent, supra,* 510 U.S. at 373, the Court was presented with the issue of whether the "express permission" in the Anti-Head Tax Act, 49 U.S.C. § 1513(b), of "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities" was "[s]ufficiently clear to rule out judicial dormant Commerce Clause analysis." In the absence of agency implementation of the AHTA, however, the Court held that the AHTA "reasonableness" standard was no different than that of the dormant Commerce Clause. 510 U.S. at 374. Here, the conflict between the RCRA "consistency" standard and the dormant Commerce Clause has been both explicated and implemented by the Agency. Indeed, EPA has expressly approved as not "unreasonable" under Section 271.4 precisely the sort (though not the degree) of differential fees for in-state and out-of-state waste which this Court struck down in *Chemical Waste Management, supra,* while "pretermit-

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States to implement federal requirements through their own programs—has also been used in a number of other environmental regulatory statutes. *See, e.g.,* Solid Waste Disposal Act, 42 U.S.C. § 6991c(d)(2) (1995); Clean Air Act, 42 U.S.C. § 7411(c) (1995); Federal Water Pollution Control Act, 33 U.S.C. § 1342(c)(1) (Supp. 1996); Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1235, 1253 (1986 & Supp. 1996); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136w-1 (1980 & Supp. 1996).

[ting]" the RCRA authorization issue to a later time. *Compare* note 1, *supra, with Chemical Waste Management,* 504 U.S. at 338-339 & 346 n.9. With the maturity of the instant case, that time has come.

B. Neutral Provisions In South Carolina's Program.

The court of appeals improperly analyzed two provisions of South Carolina's regulatory program—provisions that are not in any way discriminatory. Whatever standards for judging interstate effects are applicable, its ruling that the provisions are invalid is contrary to this Court's precedents.

South Carolina's neutral overall cap on the amount of hazardous waste disposed of by landfill is permissible under any test for evaluating effects on interstate commerce. Act No. 590, S.C. Ann. 44-56-60(a)(2), *App.* 129a, reduces the cap from its prior level of 135,000 tons per year to new, phased levels first of 120,000 tons and then of 110,000 tons. The court of appeals acknowledged that this Court has held that among the less discriminatory alternatives available to States seeking to restrict disposal of hazardous waste consistent with the requirements of the dormant Commerce Clause is " 'an evenhanded cap on the total tonnage landfilled . . . [which would] curtail volume from all sources.' " 98 F.3d at 787, *App.* 23a, quoting *Chemical Waste Mgmt.,* 504 U.S. at 345. The court of appeals ruled that the *reduction* in the cap was not evenhanded [17] because the statutory amendment providing for the reduction also provided for two exceptions: one triggered by a certification that waiver of the limit is necessary to protect South Carolina's citizens, S.C. Code Ann.

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[17] The effect of the rulings in this regard by the district court and the court of appeals was to reinstate the pre-Act No. 590 cap of 135,000 tons per year of hazardous waste disposed by landfill in South Carolina. This result illustrates the incongruity of the court of appeals' decision. Under its ruling, a cap of 120,000 tons per year or of 110,000 tons per year is impermissible, but a cap of 135,000 tons per year is valid.

§ 44-56-60(a)(3)(A), and the other by a finding that the entire statutory limit of landfilled hazardous waste was generated by South Carolina sources.[18] The court of appeals found the exceptions to be discriminatory and to disable the reduced cap. 98 F.3d at 788, *App.* 24a. It also opined that even if the reduced limit were neutral, it would not be severable. *Id.* at 788 n.21, *App.* 24a. Its analysis is wrong on both counts, and exemplifies the broad sweep of its decision to set aside state law.

Similarly, South Carolina's "needs regulation" is a non-discriminatory provision, both on its face and in practical effect. It simply does not affect what hazardous wastes private facilities accept for treatment and disposal. The court of appeals stated that the "effect on out-of-state interests is to prohibit facilities from expanding to meet out-of-state needs, but to allow expansion to meet in-state needs." 98 F.3d at 788, *App.* 25a. The court further translated the provision as an allowance for "expansion or a raise in the limits where in-state needs dictate such a rise." *Id.* There is no factual record to support any assumption at all about the *use* of an expansion in capacity, let alone that such an expansion would be dedicated to in-state needs. There certainly also is not any evidence that facilities would be planned and permitted any time there was an excess of in-state waste needing disposal but not otherwise. The case below was decided on summary judgment, without any factual development whatsoever. In

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[18] The court of appeals took no facts into account in its assessment of the exceptions. However, facts before the court, which South Carolina had put forward by way of affidavits to resist summary judgment in the district court, showed that the in-state percentage of wastes disposed subject to the cap was 11.91% for 1993 (11,972.18 tons), while the remainder (88.09%) came from out-of-state (88,527.66 tons). (Joint Appendix before court of appeals, at JA 0700.) For the first two quarters of 1994, the percentage and amounts of hazardous waste disposed in South Carolina subject to the cap were comparable. (*Id.* at JA 0702-0703.) Thus, the likelihood that the second exception would have any practical consequence was nil.

short, whether evaluated under the "reasonableness" test set out in EPA's implementing regulations, or under a dormant Commerce Clause test such as the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970),[19] South Carolina's reduced disposal cap and its needs regulation pass muster.

C. Referral to EPA Under the Primary Jurisdiction Doctrine

South Carolina raised the issue of primary jurisdiction before the district court and sought a referral to EPA because the court of appeals had earlier, in its decision on appeal from the district court's preliminary injunction, expressed frustration with EPA's variously expressed views about the meaning of the "consistency" provision of RCRA and the Agency's own implementing rules. *See HWTC*, 945 F.2d at 794, *App.* 76a, quoted *supra*, at 11 n.8. Both the district court and then the court of appeals nonetheless refused to order referral on the basis of their erroneous conclusions that EPA's decision respecting the federal statute and regulation would be irrelevant. This view ignores that the question of federal statutory construction must be resolved as a first step in this case. Regarding that question of interpretation, both the district court and the court of appeals fundamentally misperceived the nature and purpose of referral under the primary jurisdiction doctrine.

The question of what types of state laws are authorized for approval under RCRA is an issue within the special expertise of EPA. The doctrine of primary jurisdiction exists to permit courts to take advantage of agency expertise rather than attempt to answer, in the first instance, complicated questions of law and fact relating to an agency's exercise of its statutory powers. In this case,

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[19] The *Pike* test applies if a State's law regulates evenhandedly but adversely affects interstate commerce in its application. Such a law is valid unless the burdens on commerce are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

any confusion that exists regarding the interpretation or application of the statutory consistency requirement and of EPA's consistency regulation should be resolved by referral to EPA under the doctrine of primary jurisdiction. *See Ricci v. Chicago Mercantile Exchange, supra*, 409 U.S. at 307; *see also Northwest Airlines, supra*, 510 U.S. at 366 n.10 (noting that the question as to the "reasonableness" of the respondent airport's rates under the Anti-Head Tax Act "might have been referred . . . to the Department of Transportation under the primary jurisdiction doctrine").[20]

In reviewing the district court's decision not to refer the questions of statutory and regulatory interpretation to EPA, the court of appeals noted that the district court had refused to make the referral because it had found "that there were no issues of fact." 98 F.3d at 789, *App.* 26a.[21] If only questions of law were at issue, the question also arises why the court of appeals reviewed the district court's decision for abuse of discretion. While a decision to refer a case to the primary jurisdiction of an agency is generally labeled a discretionary one, where, as in this case, the district court's decision was based wholly on conclusions of law, the court of appeals should accordingly

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[20] If the "consistency" standard is held to displace the dormant Commerce Clause, respondent ETC should be required to proceed before EPA not only because EPA has primary jurisdiction, but because ETC cannot state a claim directly under RCRA in federal court. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (comprehensive scheme of administrative remedies precludes implied right of action or remedy under 42 U.S.C. § 1983). ETC's proper remedy is to petition EPA to withdraw South Carolina's RCRA authorization, and, if it remains dissatisfied, to seek judicial review of EPA's decision. *See Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991).

[21] Questions of fact were, or at least should have been, at issue, however, as shown by the discussion of the court of appeals' decision to affirm the invalidation of the State's overall cap on waste disposal and the "needs regulation" for permitting new or expanded facilities. *See supra* at 26-27 & n.18.

have reviewed that decision *de novo*. When the district court's determination is based solely on conclusions of law, the court of appeals is in as good a position as the district court to make the determination in the first instance, and accordingly, should proceed to do so. *See Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 991-93 (1st Cir. 1995) (addressing and then ordering referral to resolve "varying positions" stated by EPA whether ferric ferrocyanide is a "cyanide" for purposes of the Agency's rules). This case presents the Court with the opportunity to clarify this aspect of primary jurisdiction doctrine.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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January 10, 1997

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-2008

ENVIRONMENTAL TECHNOLOGY COUNCIL, formerly known as Hazardous Waste Treatment Council, on behalf of itself and its members,

Plaintiff-Appellee,

v.

SIERRA CLUB; ENERGY RESEARCH FOUNDATION; CITIZENS FOR CLEAN AIR AND WATER; CITIZENS ASKING FOR A SAFE ENVIRONMENT, INCORPORATED (CASE); ENVIRONMENTALISTS, INCORPORATED,

Defendants-Appellants,

and

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor; COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,

Defendants.

No. 95-2245

ENVIRONMENTAL TECHNOLOGY COUNCIL, formerly known as Hazardous Waste Treatment Council, on behalf of itself and its members,

Plaintiff-Appellee,

v.

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor; COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,

Defendants-Appellants,

and

SIERRA CLUB; ENERGY RESEARCH FOUNDATION; CITIZENS FOR CLEAN AIR AND WATER; CITIZENS ASKING FOR A SAFE ENVIRONMENT, INCORPORATED (CASE); ENVIRONMENTALISTS, INCORPORATED,

Defendants.

Appeals from the United States District Court
for the District of South Carolina, at Columbia
Matthew J. Perry, Jr., Senior District Judge
(CA-90-1402-3-0)

Argued: March 5, 1996
Decided: October 15, 1996

Before MURNAGHAN and MOTZ, Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

OPINION

MURNAGHAN, Circuit Judge:

The appeal before the court concerns South Carolina's attempt to limit the amount of hazardous waste generated

out-of-state and buried within its borders by promulgating a series of executive orders, statutes, and one regulation (collectively "the South Carolina laws") which, as compared to treatment of waste generated within South Carolina, burden out-of-state waste. The discriminating state laws would impact the operations of three commercial hazardous waste facilities owned and operated by members of the appellee-plaintiff Environmental Technologies Council ("ETC").[1] ETC filed a lawsuit challenging South Carolina's laws under the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, the Supremacy Clause, art. VI, cl. 2, and the Privileges and Immunities Clause, art. IV, § 2 cl. 1, and 42 U.S.C. § 1983 (1988). The question before the court on appeal is whether South Carolina's laws violate the Commerce Clause.[2]

We previously considered a motion by ETC for a preliminary injunction in this same lawsuit based on a Commerce Clause violation. *Hazardous Waste Treatment Council v. State of South Carolina,* 945 F.2d 781 (4th Cir. 1991) ("*HWTC*"). While remanding to the district court, we, for the most part, affirmed the district court's grant of a preliminary injunction in favor of ETC.[3]

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[1] ETC was formerly known as the Hazardous Waste Treatment Council ("HWTC"). ETC is a non-profit association of commercial firms that provide services for the treatment, recycling, and disposal of hazardous wastes.

[2] Because the district court addressed only the Commerce Clause question and our ruling on the Commerce Clause renders the challenged laws invalid, we do not reach the validity of the laws under the Supremacy Clause, Privileges and Immunities Clause, or 42 U.S.C. § 1983.

[3] We instructed the district court on remand "(1) to modify the order by striking the words that confusingly imply a declaration of invalidity, (2) to modify the order to apply only to the specific portions of the executive orders and statutes challenged as violating the Commerce Clause, and (3) to consider explicitly the balance of hardships with respect to Regulation 61-99." *HWTC,* 945 F.2d at 795.

On remand, the district court has granted summary judgment in favor of ETC, issuing a permanent injunction as to all the challenged provisions. *Environmental Technologies Council v. South Carolina,* 901 F. Supp. 1026 (D.S.C. 1995) (*"ETC"*). South Carolina and several intervenors have appealed. For the following reasons, we affirm.

I

Disposing of hazardous wastes is a national problem which raises complex technological and political issues.[4]

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[4] The Resource Conservation and Recovery Act of 1976 ("RCRA") defines "hazardous waste" as

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

The increasing problem of disposing of solid wastes—hazardous and non-hazardous—is evidenced by the number of recent lawsuits involving states' or localities' attempts to limit wastes entering their borders. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, New York,* 511 U.S. 383 (1994) (local solid waste flow control ordinance requiring all nonhazardous waste to be deposited at locally-owned facility); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon,* 511 U.S. 93 (1994) (Oregon statute imposing additional fee on solid waste generated outside the state and disposed of within the state); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* 504 U.S. 353 (1992) (Michigan law prohibiting private landfill operators from accepting solid waste that originates outside county in which facilities are located unless specifically authorized by the receiving county's plan); *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. 334 (1992) (Montana statute imposing additional fee on all hazardous waste generated out of state and disposed of within state); *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978) (New Jersey

South Carolina is one of few states which contain commercial hazardous waste treatment, storage, and disposal facilities. Thus, South Carolina absorbs a large amount of the hazardous waste that other states export.

South Carolina's attempt to limit the level of out-of-state hazardous waste entering its borders occurs against a backdrop of congressional legislation addressing the national hazardous waste problem. Congress has enacted three sets of laws which are relevant here: (1) the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. §§ 6901-6992k (1988); (2) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. §§ 9601-75 (1988); and (3) the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (1986). We briefly describe each law in so far as it is relevant to the question before us.

A. *RCRA*

RCRA establishes a cradle-to-grave regulatory program for hazardous waste management administered by the Environmental Protection Agency ("EPA"). It attempts to deal with hazardous waste before it becomes a problem by establishing minimum federal standards for the generation, treatment, storage, transportation, and disposal of hazardous waste, and the permitting of facilities to treat hazardous waste. *HWTC*, 945 F.2d at 783. RCRA also allows a state to implement its own program in lieu of

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statute prohibiting importation of most solid or liquid waste generated out of state); *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir.), *cert. denied*, 501 U.S. 1206 (1991) (Alabama statute blacklisting certain hazardous wastes generated out of state). In each case listed above a state or locality attempted to discriminate against waste generated out-of-state, and in each case the discriminatory action was ruled a violation of the Commerce Clause.

the federal program if the state's program is "equivalent to" and "consistent with" the federal or state programs applicable in other states and provides for "adequate enforcement of compliance." 42 U.S.C. § 6926(b).

Congress delegated to EPA the task of reviewing and authorizing state programs as consistent with the federal program. The EPA's regulation explaining how a state's program must be consistent with the federal program is of particular relevance to the present controversy. It requires that a state program not unreasonably impede interstate commerce.[5]

B. *CERCLA and SARA*

Passed by Congress in 1980, CERCLA establishes a cleanup program for hazardous waste which has already been disposed of improperly. CERCLA created a fund of federal money available for state cleanup efforts ("Superfund").

Finding that more was still needed to address the hazardous waste problem, Congress amended CERCLA in 1986 by enacting SARA. SARA requires that each state submit a proposal to EPA demonstrating that over a 20-year period the state will have either: (1) adequate capacity available to dispose of hazardous wastes generated within the state; or (2) arrange for the disposal of wastes generated in-state in other states through interregional

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[5] 40 C.F.R. § 271.4 provides:

> To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below . . .
>
> > (a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

agreements. 42 U.S.C. § 9604(c)(9) (1995).[6] The required plans are referred to as Capacity Assurance Plans ("CAPs"). Failure to submit an acceptable CAP results in the state becoming ineligible to receive Superfund money for remedial cleanup of hazardous waste within the state. Congress promulgated no other sanctions or incentives for states to submit CAPs.[7]

C. *South Carolina's Restrictions on the Interstate Flow of Hazardous Waste*

Because South Carolina is one of the few states which has large existing hazardous waste treatment and disposal facilities, it contends that it has borne an unfair share of the national hazardous waste burden. As a result, South Carolina has attempted, through a series of measures, to

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[6] 42 U.S.C. § 9604(c) provides:

(9) Siting

Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.

[7] The court refers the reader to its prior opinion in this litigation, *HWTC*, 945 F.2d at 783-85, for further background on RCRA, CERCLA, and SARA.

reduce the amount of hazardous waste entering its borders. South Carolina's legislature passed two statutes, its Governor signed two Executive Orders, and the South Carolina Department of Health and Environmental Control ("DHEC") promulgated one regulation—all of which were designed to limit the level of out-of-state hazardous wastes entering South Carolina for burial within the state.

The first measure enacted was a blacklisting provision, prohibiting entry into the state of certain out-of-state wastes. Section 9 of Act No. 196 of 1989 prohibits "any person who owns or operates a waste treatment facility within" South Carolina from accepting

> any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment of hazardous waste pursuant to the federal [CERCLA].

The Act codified a prior executive order, No. 89-17.

The second measure, Act No. 590 of 1990, established a limit on all waste buried within the state.[8] The limit reduces the existing statutory authorization for hazardous waste disposal by burial from 135,000 tons within the state in a year to 120,000 tons from July 1, 1990 to July 1, 1991. After July 1, 1991, the authorization drops to 110,000 tons per year. The limit on waste burial can be lifted, however, upon certification that the burial of more waste is necessary to protect the health and safety of the citizens of South Carolina or that 110,000 tons of the waste buried in South Carolina during the relevant time period was generated in South Carolina only.

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[8] The limit is most often referred to as a cap. We have used the term "limit" here in order to prevent confusion between "cap" and the acronym for Capacity Assurance Plan, "CAP."

The same Act also discriminates between waste generated in-state versus out-of-state by establishing a floor for in-state wastes and a ceiling for out-of-state wastes. All hazardous waste facilities must reserve for waste generated in-state at least the same capacity used during the previous year. On the other hand, no more hazardous waste may be buried from out-of-state than the amount buried in the previous year.

The third measure, executive order No. 89-25 promulgated on July 6, 1989, imposes quota preferences for in-state facilities to reserve at least 54,000 tons per year of the then-current statutory maximum of 135,000 tons for waste generated within South Carolina. It also limits the waste generated from any one state to 35,000 tons per year, and 10,000 tons per quarter.

The fourth and final measure, DHEC Regulation 61-99, effective January 12, 1990, imposes a needs requirement for all permits to establish or expand hazardous waste treatment and storage facilities. Need may be demonstrated by reference to only in-state need.

D. *EPA's Response*

In 1985, EPA approved South Carolina's hazardous waste program under RCRA despite the presence of a discriminatory fee imposed on waste generated out of state. 50 Fed.Reg. 46437 (1985); *HWTC,* 945 F.2d at 785 & n.2.[9] In 1989, EPA expressed concern that the blacklisting provision (Act No. 196 and Exec. Order No. 89-17) could render South Carolina's hazardous waste management program inconsistent with RCRA. Thus, the EPA requested an opinion from the South Carolina Attorney General and certification by the state that the provision was consistent with RCRA. The South Carolina Attorney General responded with an opinion that the provision was

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[9] That fee is not challenged in the instant lawsuit.

"consistent." The record contains no response by EPA or further EPA action.

Shortly thereafter, on October 17, 1989, South Carolina submitted to EPA its proposed CAP. EPA approved the CAP in May 1990, with certain conditions. That approval was granted in the context of an EPA policy of using the CAP process as its first step in addressing state actions which may be inconsistent with RCRA.[10]

Subsequently, in 1995, EPA issued a notice that it had made a final decision, subject to public review and comment, that the agency intended to find that South Carolina's hazardous waste program revisions satisfied all of the requirements necessary for final authorization under RCRA. 60 Fed.Reg. 42046 (Aug. 15, 1995). While the notice does not directly address the provisions at issue here, the notice does indicate that the EPA continues to approve South Carolina's hazardous waste program under RCRA.[11]

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[10] Memorandum from Lee M. Thomas to Regional Administrators, "Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues" (December 23, 1988).

[11] At oral argument, South Carolina asserted that the EPA 1995 RCRA approval specifically addressed one of the challenged provisions at 60 Fed.Reg. 42048, checklist item 17E. Checklist item 17E addresses the federal requirement for "location standards for salt domes, salt beds, underground mines and caves." The federal RCRA regulations addressed were promulgated by EPA on July 15, 1985. The state authority to administer the federal requirements is found at South Carolina Code §§ 44-56-30, 44-56-60(a-c), and 44-56-120. We surmise that South Carolina is referring to § 44-45-60 as being specifically authorized by EPA. Act No. 590 amended § 44-45-60 in 1990 to include the overall limit on waste disposed of by land burial, a ceiling on out-of-state waste, and a floor on in-state waste. From the information before the court, however, we do not presume that EPA specifically addressed and authorized the discriminatory provisions in question here, which were enacted in 1990 and not addressed specifically to the location standards for salt domes, salt beds, underground mines and caves. We do not view the EPA finding as to the particular federal regulation governing location

II

We review the district court's summary judgment ruling under a *de novo* standard of review. *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 274 (4th Cir. 1995); *Jackson v. Kimel*, 992 F.2d 1318, 1322 (4th Cir. 1993). Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate only where there are no genuine issues of material fact. In conducting our analysis, we review the record in the light most favorable to the nonmoving party.

South Carolina and the intervenors appeal on several grounds. First, South Carolina argues that the district court erred by applying a dormant Commerce Clause analysis because RCRA, CERCLA, and SARA override the dormant Commerce Clause, rendering the Clause inapplicable. Second, South Carolina asserts that even assuming a dormant Commerce Clause analysis applies, there were genuine issues of material fact and, therefore, summary judgment was premature. Third, South Carolina argues that even assuming its laws violate the dormant Commerce Clause, two portions of the laws—the overall limit on in-state waste burial and the needs requirement for new permits—are neutral nondiscriminating provisions and, therefore, should be severed from the invalid provisions and upheld. Finally, South Carolina argues that the district court should not have ruled on the constitutionality of the laws, but instead referred the entire lawsuit to the EPA under the doctrine of primary jurisdiction. We address each argument in turn.

We caution at the beginning of our discussion that, as we recognized in our previous opinion in this case, "what-

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standards for salt domes, salt beds, underground mines and caves as specifically addressing and authorizing the overall limit on hazardous waste burial and the ceilings and floors in question. Thus, based upon the record before the court, we disagree with South Carolina's contention that EPA has specifically addressed and authorized some of the challenged provisions.

ever our own view may be about the effectiveness of what Congress or [South Carolina] has done [and the seriousness of the hazardous waste management problem that plagues our nation], we can only apply the law." *HWTC*, 945 F.2d at 783 (citing *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 715-16 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, 501 U.S. 1206 (1991)).

A. *The Dormant Commerce Clause*

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although "phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. ——, ——, 114 S. Ct. 1345, 1349 (1994). Thus, with certain exceptions, the negative or dormant Commerce Clause prohibits states from discriminating against the free flow of interstate commerce.[12]

Where Congress has acted in an area specifically authorizing state or local government action, the dormant Commerce Clause is, however, inapplicable, even if the state interferes with interstate commerce. *Northeast Bancorp. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983). South Carolina contends that through enacting RCRA, CERCLA, and SARA, Congress created a federal scheme to address the disposal of hazardous wastes which author-

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[12] The Commerce Clause applies to the interstate flow of hazardous waste. *Chemical Waste Management*, 504 U.S. at 340 n.3.

ized the state laws challenged here, thus displacing the dormant Commerce Clause.

In order for a state law to be removed from the reach of the dormant Commerce Clause, however, congressional intent to authorize the discriminating law must be either "unmistakably clear" or "expressly stated." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 91-92 (1984). Congress need not state that it intends to override the dormant Commerce Clause, but it must affirmatively have contemplated the otherwise invalid state legislation. *Id.*

South Carolina contends that Congress did just that on a number of levels. First, South Carolina insists that under RCRA, Congress has expressly authorized any state law or program addressing hazardous wastes which meets EPA's consistency standard of "reasonableness." 40 C.F.R. § 271.4. Second, South Carolina argues that through delegating the authorization of state programs to the EPA under RCRA and CERCLA, Congress created a system of checkpoints for a state's hazardous waste program. South Carolina contends that by providing the checkpoints, Congress has "affirmatively" authorized the state laws because they are contained in an EPA-approved RCRA program and CAP. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155 (1982). Finally, South Carolina argues that the CAP requirement affirmatively contemplates and sanctions states discriminating against other states' wastes. Regional agreements, South Carolina asserts, will require that states set aside capacity for states party to the agreement, thus necessitating discrimination among the states. Furthermore, South Carolina contends it must favor its own wastes in order to assure the capacity for in-state wastes it has demonstrated in its CAP.

We previously found at the preliminary injunction stage that RCRA, CERCLA, and SARA did not contain any language indicating "an unmistakably clear congressional intent to permit states to burden interstate commerce."

HWTC, 945 F.2d at 792. Neither South Carolina, nor the intervenors have come forward with any further persuasive evidence indicating that Congress intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause. *Id.*[13]

More specifically, we reject, as we did before, South Carolina's argument that EPA's reasonableness standard should displace a constitutional dormant Commerce Clause analysis. The EPA's position on what constitutes "reasonableness" has changed over time.[14] While EPA may

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[13] The Supreme Court has not yet addressed this question. In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), the Supreme Court pretermitted the issue raised by the amici curiae in that case of whether Congress had authorized a discriminatory fee Alabama imposed on out-of-state hazardous wastes disposed of at commercial facilities located in Alabama. *Id.* at 346 n.9. Applying the dormant Commerce Clause, the Supreme Court held that the discriminatory fee violated the Commerce Clause and declared the law unconstitutional. The Court refused to consider the question of whether the Commerce Clause did not apply at all because that issue had not been a basis for the lower court's decision or briefed and argued by the parties.

[14] EPA has taken seemingly contradictory positions at different times on how it will apply and interpret the consistency requirement. In 1980, EPA adopted the approach taken in a then- recent Supreme Court opinion, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which applied the dormant Commerce Clause to strike down state statutes discriminating against out-of-state liquid or solid wastes. The Court's approach rested on the premise that state regulations which discriminated facially, in effect or in purpose, were virtually *per se* invalid. *City of Philadelphia*, 437 U.S. at 624-27. Following that precedent, EPA pronounced that under its consistency regulation, § 271.4, any state program which "operates as a ban on the interstate movement of hazardous waste is automatically inconsistent." *HWTC*, 945 F.2d at 793 (citing 45 Fed.Reg. 53395 (1980)).

In 1985, EPA "altered" its approach to the consistency requirement. That year, EPA ruled that under its consistency regulation, the agency would apply a "reasonableness" test to interstate com-

change its position on what "consistency" entails, the Constitution has not changed and, in the absence of a clear Congressional statement authorizing discrimination by the states with respect to hazardous wastes, we must apply the Constitution's dictates. *See C & A Carbone*, 511 U.S. at ——, 114 S. Ct. at 1691-92 (O'Connor, J. concurring) (emphasizing high degree of specificity with which Congress must "explicitly" authorize state law otherwise violating the Commerce Clause).[15]

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merce restrictions. *HWTC*, 945 F.2d at 794 (citing 50 Fed.Reg. 46439 (1985)). Thus, EPA announced that it did "not agree that *any* disparity in treatment between in-state and out-of-state wastes is *per se* unreasonable" seemingly abandoning its prior constitutional standard. *Id.*

[15] The instant case is distinguishable from the opinion on which South Carolina places a great deal of reliance, *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983), for its proposition that Congress has authorized the State's laws through RCRA and CERCLA. In *White*, the Mayor of Boston, Massachusetts issued an executive order requiring all construction projects funded by the city to be performed by workers at least half of whom were bona fide residents of Boston. The order was challenged as violating the Commerce Clause. The Supreme Court upheld the Mayor's order, finding that Boston acted as a market participant in spending the city's money. There is a well-settled exception to the dormant Commerce Clause for states or cities acting as market participants as opposed to government regulators of the market. *Id.* at 206-08. Additionally, the Court noted that although federal funds were also implicated, Congress had specifically contemplated and directed that those funds be used in a similar manner to the city's money: to stimulate economic recovery; to create permanent jobs; to retain jobs that would be lost; to provide jobs to lower income persons and minorities, including the unemployed; and to retrain workers. *See, e.g.*, 42 U.S.C. §§ 3131, 5318. Furthermore, the regulations implementing Congress's directives contained similar mandates, affirmatively permitting the type of parochial favoritism contained in the Mayor's executive order. *White*, 460 U.S. at 213-14 n.11. Thus, the preference for local employment had been expressly contemplated and authorized by Congress. In contrast, here, Congress merely contemplated that state RCRA programs be consistent with the federal and other states' approved programs. Congress did not contemplate

We also find that Congress has not provided a series of checkpoints which authorize discrimination by South Carolina against other states' hazardous wastes. South Carolina relies on *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), for the proposition that a series of congressionally created checkpoints for a state's law authorizes the state to discriminate against interstate commerce. The facts of *Merrion,* however, are distinguishable.

In *Merrion,* the Court upheld, in the face of a Commerce Clause challenge, a tax imposed by the Jicarilla Apache Indian Tribe on oil and gas extracted from tribal reservation land. The Court found that the Tribe had the power as an independent sovereignty to impose the tax. *Id.* at 136-52. The Court also noted that the tax would survive dormant Commerce Clause scrutiny, if applied, because Congress had displaced the Commerce Clause by providing a series of precise federal checkpoints that must be cleared before such a tax could be implemented. *Id.* at 154-56. Congress required that under the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, "a tribe . . . obtain approval from the Secretary [of the Interior] before it adopts or revises its constitution to announce its intention to tax nonmembers." *Id.* at 155. Congress was also aware that Indian tribes impose taxes of the sort in question. *Id.* at 156. Furthermore, the tax had been expressly approved by the Secretary through the checkpoints established for such taxes. *Id.* at 155-56. Thus, Congress expressly authorized such taxes being implemented by Indian Tribes if approved by the Secretary of the Interior.[16]

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nor direct that state RCRA programs implement economic barriers to hazardous waste from other states. Nor do the EPA's regulations affirmatively and expressly authorize economic barriers to the interstate movement of hazardous wastes.

[16] The Court further concluded that the tax would survive Commerce Clause scrutiny because it did not discriminate against interstate commerce in violation of the Commerce Clause. *Merrion,* 455 U.S. at 156-58. The tax had a substantial nexus with the taxing

In contrast, here, one cannot say that Congress expressly contemplated or authorized violations of the dormant Commerce Clause by states limiting access to their hazardous waste facilities when it enacted RCRA, CERCLA, and SARA. Thus, no congressionally established "checkpoints" expressly anticipate or authorize the challenged state laws. Furthermore, the EPA has not expressly approved any of the contested South Carolina laws.[17]

We also reject South Carolina's argument that the CAPs requirement contemplates and requires that South Carolina discriminate against out-of-state waste in order to assure capacity for its in-state waste and to fulfill its interregional agreements. In our prior opinion, *HWTC*, 945 F.2d at 794-95, we stated that CERCLA requires only

> an "assurance" of twenty-year availability of arranged adequate capacity. It does not [require] that the state must ensure that hazardous waste actually is treated and disposed of either in-state or pursuant to an interstate or regional agreement. CERCLA § 104(c)(9) contemplates that adequate national capacity will exist if each state can assure that it has adequate capacity for in-state generated waste after taking into consideration out-of-state waste that it has agreed to import and in-state waste that it has agreed to export. However, no part of § 104(c)(9) appears to permit or require a state to limit its actual in-state capacity to in-state waste to receive Superfund money. *See* OSWER Directive 9010.00a at 4, 6. In fact, it appears that, if a state refuses to build in-state facilities or make alternate arrangements, it will be denied

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Tribe, was fairly apportioned, related to the services provided by the Tribe, and was nondiscrimniatory because it was imposed on minerals sold on the reservation and minerals transported off the reservation before sale. *Id.*

[17] Even if EPA had expressly approved the laws in question, we could not do so without express congressional authorization.

> Superfund money, even if, in reality, all in-state generated waste is safely exported. If congressional intent had been to subject citizens of recalcitrant states to environmental danger by barring export of otherwise untreated and undisposed of hazardous waste, it could have been easily made clear. "A state not in compliance with this section may not export any waste." In the absence of such intent, we suspect that Congress believed the penalty of no access to federal Superfunds for waste cleanup would be sufficient.

South Carolina has not presented any evidence sufficient to dissuade us of our prior thinking. Furthermore, as the Eleventh Circuit noted in responce to a similar argument, if the state's CAP depends on capacity provided by a commercial, privately owned management facilty, the state can contract with that private facility for that capacity, instead of blocking the private facility from accepting wastes from other states. *National Solid Wastes Managament Ass'n,* 910 F.2d at 720-21 (rejecting similar argument that SARA expressly authorized state law discriminating against out-of-state hazardous waste); *Alabama v. EPA,* 871 F.2d 1548, 1555 n.3 (11th Cir.) (finding that Congress had not overridden Commerce Clause through enacting CERCLA) *cert. denied,* 493 U.S. 991 (1989). Thus, we apply a dormant Commerce Clause analysis to South Carolina's laws.

B. *Application of Dormant Commerce Clause*

We apply a two-tiered analysis to state actions allegedly violating the dormant Commerce Clause. The first tier, "a virtually *per se* rule of invalidity'" applies where a state law discriminates facially, in its practical effect, or in its purpose. *Wyoming v. Oklahoma,* 502 U.S. 437, 454-55 (1992) (quoting *City of Philadelphia,* 437 U.S. at 624). In order for a law to survive such scrutiny, the state must prove that the discriminatory law "is demonstrably justi-

fied by a valid factor unrelated to economic protectionism," *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988), and that there are no "nondiscriminatory alternatives adequate to preserve the local interests at stake," *Hunt*, 504 U.S. at 342 (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 1977)). To date, the Supreme Court has upheld such discriminatory laws only where the discrimination was justified by the threat of death or disease. *See, e.g., Maine v. Taylor*, 477 U.S. 131 (1986) (upholding Maine's prohibition on importing live baitfish because of the potential for destruction of Maine's fisheries); *Clason v. Indiana*, 306 U.S. 439 (1939) (upholding Indiana's restrictions on transporting dead animals without a license because of the potential for disease).

The second tier applies if a statute regulates evenhandedly and only indirectly affects interstate commerce. In that case, the law is valid unless the burdens on commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The line between the *per se* rule and the *Pike* balancing test is not clear. Nonetheless, most of the provisions at issue here are not close calls—they clearly discriminate against out-of-state waste either facially, in effect, or in purpose. The blacklisting provision, floor for in-state wastes, ceiling for out-of-state wastes, and quotas for out-of-state and in-state wastes facially discriminate against out-of-state wastes by refusing admittance into South Carolina of certain wastes and giving express preference over South Carolina capacity to in-state wastes. Their effect, if implemented, would also clearly discriminate against out-of-state wastes. As for purpose, we have no reason to reverse the district court's finding that the laws in question constitute "an integrated and interconnected discriminatory program," *ETC*, 901 F.Supp. at 1029, whereby South Carolina has "attempted 'to isolate itself from a problem common to [the nation] by erecting

a barrier against the movement of interstate trade'," HWTC, 945 F.2d at 791 (quoting *City of Philadelphia*, 437 U.S. at 628).[18]

A state cannot achieve a legitimate economic goal through "the illegitimate means of isolating the State from the national economy." *Wyoming*, 502 U.S. at 456-57 (quoting *City of Philadelphia*, 437 U.S. at 627). The relevant economic unit is the nation, and the Commerce Clause prohibits states from balkanizing into separate economic units. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949). Thus, South Carolina faces a heavy burden in justifying its discriminatory practices. To survive summary judgment, South Carolina must demonstrate issues of fact regarding whether the laws are justified by a valid factor unrelated to economic protectionism and, if so, that there are no neutral alternatives available.

While South Carolina failed to articulate precisely its purpose in discriminating against out-of-state waste, the district court found several motivating concerns. The district court first found that South Carolina was motivated by the state's concern for the "health, safety, and welfare of its citizens." *ETC*, 901 F.Supp. at 1033-34. There is "no basis to distinguish out-of-state waste from domestic waste" over concern for citizens' health, safety, and welfare, however. Hazardous waste is equally dangerous whether generated within South Carolina or out-of-state. *See Chemical Waste Management*, 504 U.S. at 344-45 (holding that hazardous waste's danger to the health and safety of Alabama's citizens "does not vary with the point of origin of the waste"); *HWTC*, 945 F.2d at 792 (citing *City of Philadelphia*, 437 U.S. at 629).

The State's second concern was with preserving existing disposal capacity for waste generated within South Caro-

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[18] For example, the stated purpose of Act No. 196 (blacklisting provision) is to "give preference to hazardous waste generators within" South Carolina. Act No. 590 gives the same preference to hazardous waste generators within the state.

lina. *ETC*, 901 F.Supp. at 1034. Natural resources, however, may not be hoarded under the Commerce Clause. "[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Philadelphia*, 437 U.S. at 627; *see also New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982). Thus, "[t]he burden . . . of conserving the State's remaining landfill space should not fall disproportionately on out-of-state interests." *HWTC*, 945 F.2d at 792 (citing *City of Philadelphia*, 437 U.S. at 628).

The third concern the district court found was South Carolina's worries about "transportation risks." *ETC*, 901 F.Supp. at 1034. Just as with the State's concern with health and safety, there is little to distinguish out-of-state waste from in-state waste in this regard. Furthermore, neutral alternatives exist for regulating transportation of all hazardous waste regardless of origin. *Chemical Waste Management*, 504 U.S. at 345-46.

Finally, there was South Carolina's concern that it is shouldering an unfair burden of the nation's hazardous wastes. *ETC*, 901 F.Supp. at 1034. The Commerce Clause does not purport to require fairness among the states in interstate commerce. The "apparent Congressional intent of RCRA and SARA would seem" to be "that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states." *HWTC*, 945 F.2d at 792.

On appeal, South Carolina reframes its purposes as: (1) complying with the CAP by guaranteeing capacity; and (2) addressing "orphan" wastes—hazardous waste from a state which prohibits its disposal and has failed to enter into a CAP for its disposal. As previously explained, the CAP requirement does not require or contemplate that a state discriminate against out-of-state waste in order to comply. Nor does the Commerce Clause allow states to punish other states for not disposing of

their wastes through a CAP or otherwise. That task is left exclusively to Congress.

In briefing its appeal, South Carolina pointed to no specific issue of fact as to any potential purpose for discriminating against out-of-state waste. Rather, the State merely argued that it is entitled to present evidence that it has no alternative but to differentiate among out-of-state wastes to protect its citizens' health and safety and to comply with CERCLA.

At the summary judgment stage, South Carolina has a burden to demonstrate disputed issues of material fact. South Carolina has failed to meet its burden. None of the affidavits South Carolina submitted even purport to justify South Carolina's discriminatory treatment of out-of-state wastes. *ETC*, 901 F.Supp. at 1030.[19] Nor do any of the affidavits purport to demonstrate that no neutral alternatives exist to discrimination.

C. *Limit on Waste Buried In-State and Needs Requirement*

As for two portions of the South Carolina laws, it is not so obvious, however, that they discriminate either facially, in effect, or in purpose, such that the *per se* test applies. South Carolina therefore argues that even if we find that the dormant Commerce Clause applies and that the laws are invalid, portions of the laws—the overall limit imposed by Act No. 590 and the needs requirement imposed by DHEC regulation 61-99—do not discriminate against interstate commerce. Therefore, South Carolina contends, the valid portions should be severed from the invalid portions and remain in effect. We disagree.

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[19] South Carolina merely presents a series of affidavits that describe its hazardous waste program; the amount of wastes buried in state, broken down by in-state and out-of-state wastes; and similar statistics.

1. *Limit*

An evenhanded cap or limit uniformly burdens both in-state and out-of-state interests. *See, e.g., Chambers Medical Technologies of S.C. v. Bryant*, 52 F.3d 1252, 1258 (4th Cir. 1995). Thus, the Supreme Court has held that the dormant Commerce Clause allows a state to impose "an evenhanded cap on the total tonnage landfilled" with hazardous waste when it "curtail[s] volume from all sources." *Chemical Waste Management*, 504 U.S. at 345. South Carolina contends that its reduction of the statutory authorization of 135,000 tons per year to 120,000 tons and then 110,000 tons is an evenhanded neutral limit that does not burden interstate commerce any more than intrastate commerce.[20]

The limit South Carolina seeks to have upheld, however, is not as evenhanded and neutral as the state would have the court believe. The limit does not have the same effect on in-state as out-of-state wastes because the limit can be lifted upon certification that it is necessary to protect South Carolina's citizens, S.C. Code Ann. § 44-56-60(a)(3)(B) (Law Co-op Supp. 1995), or that the entire statutory authorization of buried waste during the relevant 12-month period was generated in South Carolina, S.C. Code Ann. § 44-56-60(a)(3)(B) (Law Co-op Supp. 1995). The same exceptions are not granted to out-of-state interests. The Supreme Court has declared that "[t]he commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work

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[20] South Carolina also contends that we expressly excluded the overall limit as one of the items properly enjoined in our previous opinion addressing the preliminary injunction. *HWTC*, 945 F.2d at 787 n.9. While we referenced the statutory section containing the limit in our list of sections to be enjoined, we specifically referred to another subsection. Today, however, for the reasons set forth below, we clarify that the limit is included as one of the items that violates the Commerce Clause.

discrimination against interstate commerce." *West Lynn Creamery, Inc. v. Healy*, 511 U.S. ——, ——, 114 S. Ct. 2205, 2215-16 (1994) (citing *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940); *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 147 (1978)). Here, the exception favors in-state interests over out-of-state interests. Thus, the overall limit is not facially neutral, but rather discriminatory and, therefore, subject to the same *per se* test applied to the other discriminatory provisions of Act 590. The limit fails to survive such scrutiny for the same reasons that the floors and ceilings in Act 590 failed.[21]

2. *Needs Requirement*

The needs regulation requires that a permit application for new or expanded hazardous waste facilities demonstrate need by reference to the level of waste generated in

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[21] Even if the limit were nondiscriminatory, it would not be severable. State law governs the severability of a state statute. *Muller v. Curran*, 889 F.2d 54, 57 (4th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990). Thus, in determining whether the overall limit can be severed, we turn to South Carolina law. Under South Carolina law, "[t]he test for severability is whether the constitutional portion of the statute remains 'complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution.'" *Thayer v. South Carolina Tax Comm'n*, 413 S.E.2d 810, 814-15 (S.C. 1992) (citing *Shumpert v. South Carolina Dep't of Highways & Public Transp.*, 409 S.E.2d 771 (1991)) (footnote omitted).

We cannot fairly presume that the South Carolina legislature would have passed the overall limit without the provision allowing the limit's increase if South Carolina wastes exceeded the cap. Nor can we assume that the limit would have been passed without the remaining provisions of the statute, which include floors for in-state-wastes and ceilings for out-of-state wastes. By protecting capacity for in-state interests, the legislature may have quelched in-state political interests that might otherwise have lobbied against the overall limit. Thus, we conclude that the limit provision is not severable.

South Carolina only. South Carolina contends that the needs requirement is neutral, functioning similarly to an evenhanded cap and therefore valid. In our earlier opinion, we found that "[o]n its face [the needs requirement] appears not to regulate evenhandedly. It permits South Carolina to refuse to allow new construction if all of its waste can be disposed of by exportation. The 'practical effect' . . . of the regulation may be to favor in-state interests over out-of-state interests." *HWTC*, 945 F.2d at 791 n.14 (citation omitted). Indeed, currently, the practical effect may be to establish a ban on building new capacity.

We find that the needs requirement is not similar to an evenhanded cap with the same effect on both in-state and out-of-state interests. The effect on out-of-state interests is to prohibit facilities from expanding to meet out-of-state needs, but to allow expansion to meet in-state needs. Thus, just as with the overall limit in question, the needs requirement contains an exception for in-state needs allowing expansion or a raise in the limit where in-state needs dictate such a rise. While the limit once imposed applies equally to out-of-state and in-state wastes, in effect, it guarantees in-state generators of waste space because the limit can always be raised in order to meet in-state needs.

Therefore, we apply the *per se* test to Regulation 61-99.[22] The needs regulation does not survive the *per se* test for

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[22] South Carolina's reliance on *Chambers Medical Technologies of South Carolina v. Bryant*, 52 F.3d 1252 (4th Cir. 1995), does not aid its cause. South Carolina seeks to establish that the needs regulation is similar to South Carolina's fluctuating cap for infectious waste based on the amount of waste generated in South Carolina alone. In *Chambers*, we held that the fluctuating cap for infectious waste might pass Commerce Clause scrutiny if it regulated in an evenhanded fashion and had only incidental effects on interstate commerce; whereas it would not be constitutional if it discriminated facially, in effect, or in purpose, thus necessitating that the *per se* test be applied. *Id.* at 1262. Here, the regulation discriminates in effect. Thus, the *per se* test applies.

Furthermore, significantly, we noted that the fluctuating cap in *Chambers* did not operate as a ban on the expansion of facilities.

the same reasons the remainder of the challenged South Carolina laws failed to survive. South Carolina has raised no issue of fact as to a state rationale unrelated to the origin of the waste for its needs requirement.

D. *Primary Jurisdiction*

Finally, South Carolina attempts to persuade us that the district court erred by failing to defer under the doctrine of primary jurisdiction to the EPA in the first instance as to whether South Carolina's laws are constitutional.[23] "No fixed formula exists for applying the doctrine of primary jurisdiction." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Generally speaking, the doctrine is designed to coordinate administrative and judicial decision-making by taking advantage of agency expertise and referring issues of fact not within the conventional experience of judges or cases which require the exercise of administrative discretion. *Id.*; *Commonwealth of Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), and *cert. denied*, 464 U.S. 866 (1983).

The district judge refused to refer the instant lawsuit to the EPA under the doctrine of primary jurisdiction because he found that there were no issues of fact. Primary

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52 F.3d at 1262. It merely limited the amount of infectious waste any one facility could process. While the South Carolina Code required that a permit be obtained in order to build a new facility and that infectious waste generated out-of-state could only be considered in the needs calculations with DHEC approval, the *Chambers* court assumed that the DHEC would not deny a permit on a basis violating the Commerce Clause. *Id.* at 1262 n.15. Thus, in dicta, we suggested in *Chambers* that outright bans on expansion based on in-state needs only will most likely not survive dormant Commerce Clause scrutiny.

[23] As conceded in oral argument, however, South Carolina has not requested that the EPA intervene in this case as an *amicus curiae*, nor has the EPA sought intervention.

jurisdiction, he held, applied only to the referral of factual, not legal, issues. He further reasoned that the "constitutional issues . . . [at stake were more] properly within the traditional purview of an Article III court, and are not those to which EPA could conceivably lend some degree of expertise." *ETC*, 901 F. Supp. at 1029. We review the district court's decision declining to refer the lawsuit to the EPA under the doctrine of primary jurisdiction for abuse of discretion. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 921 (1994).[24]

The district court did not abuse its discretion. The EPA's special expertise is not needed to decide a question of law in a constitutional matter.

Accordingly, the district court's judgment is

AFFIRMED.

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[24] South Carolina contends that the district court's refusal to apply the doctrine of primary jurisdiction was based wholly on erroneous conclusions of laws and should therefore be reviewed *de novo*. "[D]espite what the term [primary jurisdiction] may imply, [it] does not speak to the jurisdictional power of the federal courts. It simply structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts." *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d at 1162 (quoting *United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983)). Thus, the decision not to refer a lawsuit to an agency under the doctrine of primary jurisdiction is a discretionary matter which we review for abuse of discretion. Furthermore, because the matter at issue is a constitutional question which lies within this court's expertise, the district court correctly applied the law.

APPENDIX B

[Filed Apr. 13, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:90-1402-0

ENVIRONMENTAL TECHNOLOGIES COUNCIL,
On behalf of itself and its members,
Plaintiff,

-vs.-

STATE OF SOUTH CAROLINA, *et al.*,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The plaintiff has moved for summary judgment, asserting that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Plaintiff seeks a declaration that certain executive orders, statutes and a regulation are invalid under the Interstate Commerce Clause of the United States Constitution.[1] Previously, this Court concluded that the plaintiff would probably prevail on the merits and entered a preliminary injunction. *Hazardous Waste Treatment Council v. South Carolina,* 766 F. Supp. 431 (D.S.C. 1991).[2] That deci-

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[1] "Congress shall have the power . . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

[2] The plaintiff has now changed its name from "Hazardous Waste Treatment Council" to "Environmental Technologies Council."

sion was affirmed by the United States Court of Appeals for the Fourth Circuit and remanded for modification of the preliminary injunction. 945 F.2d 781 (4th Cir. 1991). Thereafter, the defendants and the intervenors filed motions to modify the preliminary injunction as directed by the Court of Appeals. The plaintiff has filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. The Court has now considered the extensive memoranda submitted by the parties, together with the oral arguments and now enters its findings of fact and conclusions of law.

I. PRIMARY JURISDICTION

At the September 20, 1994 hearing, this Court denied Defendants' Motion to stay and refer this case to the U.S. Environmental Protection Agency ("EPA") under the primary jurisdiction doctrine. Primary jurisdiction applies only to the referral of relevant *factual,* rather than *legal,* issues to a federal agency. *See Far East Conference v. United States,* 342 U.S. 570, 574 (1952); *Nader v. Allegheny Airlines,* 426 U.S. 290, 304 (1976). In this case, there are no material facts genuinely in dispute, and thus there are no factual issues requiring resolution by EPA.

Moreover, the constitutional issues raised here are properly within the traditional purview of an Article III court, and are not those to which EPA could conceivably land some degree of expertise. *See Environmental Defense Fund v. Wheelabrator Technologies,* 725 F. Supp. 758, 775 (S.D.N.Y. 1989), *quoting Board of Educ. of City School Dist. v. Harris,* 622 F.2d 599, 607 (2d Cir. 1979), *cert. denied,* 499 U.S. 1124 (1981) ("It is well established that the courts need not defer to an agency where the issue involved is a strictly legal one, involving neither the agency's particular expertise nor its fact finding prowess"); *See also Sierra Club v. DOE,* 734 F. Supp. 946, 951 (D. Colo.

1990) ("Where, as here, the issue is strictly legal, a court need not defer to a state agency"). In accordance with the mandate of the Fourth Circuit, this Court concludes that referral to EPA is not appropriate. *Hazardous Waste Treatment Council v. South Carolina,* 945 F.2d 781, 794 (4th Cir. 1991) ("EPA may change its interpretation of its own regulation; however, we cannot change the commands of the Constitution and Congress") ("HWTC II").

II. MOTION TO MODIFY THE PRELIMINARY INJUNCTION

This Court has considered both Plaintiff's Motion for Summary Judgment and Defendants and Intervenors' Motion to Modify the Preliminary Injunction. Because summary judgment is appropriate, any modification of the preliminary injunction is now moot, and the motion to modify is denied. To the extent the permanent injunction issued herewith differs from the January 20, 1991 preliminary injunction, *see Hazardous Waste Treatment Council v. South Carolina,* 766 F. Supp. 431 (D.S.C. 1991) ("HWTC I"), those changes are reflected below.

III. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case challenges South Carolina's discriminatory efforts to regulate the management of hazardous waste services located in the State.[3] At issue are two statutes, two executive orders, and one regulation which constitute an integrated and interconnected discriminatory program.

As this Court and the Court of Appeals concluded at the preliminary injunction stage, the State's discriminatory program violates the Commerce Clause. Because there are

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[3] There are three facilities in South Carolina licensed to handle hazardous waste. The largest, located in Pinewood, is a disposal facility operated by Laidlaw Environmental Services of South Carolina, Inc. *See HWRC I,* 766 F. Supp. at 435.

no material facts in dispute regarding the State's program, summary judgment is appropriate at this stage. *See Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Chemical Waste Management, Inc. v. Hunt,* 112 S.Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* 112 S.Ct. 209 (1992); *C&A Carbone, Inc. v. Town of Clarkstown, New York,* 114 S.Ct. 1677 (1994); *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality,* 114 S.Ct. 1345 (1994); *National Solid Waste Management v. Alabama Dep't of Env't,* 910 F.2d 713 (11th Cir. 1990), *cert. denied,* 111 S.Ct. 2800 (1991).

Initially, the State and Intervenors must come forward with competent evidence demonstrating a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e). *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Defendants have failed to bring forward any evidence relevant to meeting this burden in the context of a case challenging facial discrimination against interstate commerce. *See, e.g., Wyoming v. Oklahoma,* 112 S.Ct. 789 (1992); *Healy v. Bear Inst., Inc.,* 491 U.S. 324 (1989); *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978).

In particular, none of the eight affidavits the State has provided raises a material fact in issue. The first, from Lewis Bedenbaugh of the Department of Health and Environmental Control ("DHEC"), addresses Superfund clean-up activities in South Carolina, (Exhibit 1, Defendant's Memorandum In Opposition to Motion for Summary Judgment.) The second and third, both by David Wilson of DHEC, address volumes of hazardous waste being treated, stored and disposed of in South Carolina and the permitting process. (Exhibits 2 and 3.) The fourth, and fifth, both by John Buchanan of DHEC, address the transportation and record-keeping of hazardous waste in South Carolina, and the State enforcement program for haz-

ardous waste facilities. (Exhibits 4 and 5.) The sixth, seventh, and eighth, all by Robert King of DHEC, address 1) hazardous waste management capacities in various states, 2) South Carolina's EPA authorization to administer its own hazardous waste management program, and 3) South Carolina's efforts to enter a Capacity Assurance Regional Agreement. (Exhibits 6-8.) While some of the attachments to these affidavits do provide breakdowns for in-state and out-of-state waste, none of the affidavits even *purports* to justify South Carolina's discriminatory treatment of out-of-state waste.

The State's failure to raise a factual issue for trial demonstrates, as a matter of law, that the State cannot carry its burden under the Commerce's Clause's "strict scrutiny" standard. As the Court of Appeals noted, "[t]he Commerce Clause directly limits the power of the States to discriminate against interstate commerce." *HWTC II*, 945 F.2d at 789, *quoting New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) ("New Energy"). A facially discriminatory program such as is at issue here is invalid " 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.' " 945 F.2d at 790, *quoting Maine v. Taylor*, 477 U.S. 131 (1986). "Justifying discrimination is difficult to say the least." *HWTC II*, 945 F.2d at 790. Where, as here, each of the challenged laws "do not regulate evenhandedly but discriminate on their face against out-of-state hazardous waste," *id.* at n. 13, there is a "virtually *per se* rule of invalidity . . . ." *New Energy*, 486 U.S. at 278-79, *quoting Philadelphia v. New Jersey*, 437 U.S. at 624. Therefore, " 'the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives' " applies. *Wyoming v. Oklahoma*, 112 S. Ct. 789, 801 (1982), *quoting Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

At the preliminary injunction stage this Court noted that, "[p]laintiff will likely succeed on the merits in their

challenge to these actions under the Commerce Clause." *HWTC I*, 766 F.Supp. at 441. The Court also noted that, "[I]t may not be gainsaid that the public interest is best served when unconstitutional laws are enjoined." *Id.* at 442. At this stage, as Defendants have not come forward with any evidence demonstrating a genuine issue of material fact regarding the State's purported "legitimate local purpose" or the "absence of nondiscriminatory alternatives," summary judgment is appropriate.

A. *Undisputed Material Facts*

1. *South Carolina's Discrimination Program*

The program challenged here has five interrelated components, comprised of two executive orders, two statutes, and one DHEC regulation. Together they compose one overall program designed to provide a system of preferential treatment for hazardous waste generators in-state at the expense of out-of-state generators. Section 9 of Act No. 196 of 1989, which amends S.C. Code Ann. Section 4456-130, and Executive Order ("E.O.") No. 89-17, the "blacklisting" provisions, prohibit the introduction into South Carolina of any hazardous waste from generators in particular states—those which, as determined by South Carolina: (1) prohibit treatment, storage or disposal of such waste within their borders, or (2) fail to enter into a regional or interstate agreement with South Carolina regarding the management of such wastes. *See HWTC I.* 766 F. Supp. at 436-37. This statute and order also require the State's treatment and disposal facilities to give preference to hazardous waste generators within the State. Section 5, Act No. 196; S.C. Code Ann. 44-56-205; E.O. 89-17. The State and Intervenors have essentially abandoned any argument that these two laws pass muster under the Commerce Clause.

Act No. 590 of 1990, amending S.C. Code Ann. Section 44-56-59 and Section 44-56-60(a), and E.O. No. 89-25, the "quota" provisions, put inequitable limits on

the amount of hazardous waste that can be disposed of in South Carolina. *See HWTC I*, 766 F.Supp. at 437-48. As proof of its discriminatory purpose, S.C. Code Ann. Section 44-56-59 provides:

> *(A) The General Assembly finds:*
>
> (1) The existing commercial land disposal facility in South Carolina [Pinewood] and available capacity in this State generally are limited resources;
>
> (2) It is essential that the limited waste treatment and disposal capacity of the existing commercial facility [Pinewood] and the State in general be preserved, ready and available to ensure that the needs of South Carolina are met first;
>
> (3) The existing commercial land disposal facility [Pinewood] as well as other hazardous waste treatment and disposal facilities must give preference to hazardous waste generators within the State for treatment and disposal of hazardous materials at licensed facilities in the State;
>
> (4) The General Assembly [Act No. 196] and the Executive branch [E.O. Nos. 89-17 and 89-25] have mandated restrictions on the importation of out-of-state wastes and on the capacity of existing hazardous waste landfills; and
>
> (5) Reducing the amount of hazardous waste shipped to South Carolina commercial facilities will send a message to all states that South Carolina intends to reduce to the greatest extent possible the amount of hazardous waste treated and disposed of in this State.
>
> (B) Based upon these findings the General Assembly declares that:
>
> * * * *
>
> (2) As this State reduces its reliance on landfilling—the amount of hazardous waste being shipped into the State should be reduced and eliminated also.

Accordingly, Section 44-56-60(a)(2) of Act No. 590 subjects Pinewood to a lowered disposal quota of 110,000 tons per year.[4] Of that quota, E.O. No. 89-25 sets aside 54,000 tons for hazardous waste "generated in South Carolina." Thus a substantial portion—45 percent of the overall quota—is reserved for South Carolina waste.

Section 44-56-60(a)(3) of Act No. 590 requires that Pinewood reserve *at least* as much capacity for in-state waste as the facility disposed during the previous twelve months. Thus, if more than 54,000 tons is disposed of by South Carolina, that new amount now serves as a floor for the next 12 months. Pinewood may not, however, accept *any more* out-of-state waste than it accepted during the previous twelve months. Thus, if Pinewood accepted less than 56,000 tons from its out-of-state customers over the previous twelve months, that *lower amount* now serves as a *new ceiling* for the next twelve months. South Carolina generators of waste thus benefit from preferential treatment contained in Section 44-56-60(a)(3) while out-of-state customers fight for access to the shrinking portion of the lowered 110,000 ton total.

Further, under E.O. 89-25 generator-customers located in other states may only utilize up to 35,000 tons of the overall out-of-state quota and not more than 10,000 tons per quarter. E.O. No. 89-25. South Carolina generators, then, are entitled to bring to Pinewood each year over 50% *more* waste than generators from any other one state (54,000 tons as compared with 35,000 tons.)

The final element in this discriminatory program is DHEC Regulation 6199. This regulation contains requirements for the permitting of new or expanded hazardous waste management facilities, including a "demonstration of need" for the new or expanded facility. Plaintiff does

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[4] From July 1, 1990 to July 1, 1991, the capacity limit was 120,000 tons. After July 1, 1991, the 110,000 limit was to go into effect, except for this court's preliminary injunction.

not challenge this regulation in its entirety. Instead, plaintiff only seeks to declare invalid that portion which prohibits an applicant from including out-of-state waste in the demonstration of need: "[f]or the purposes of demonstrating need, Hazardous Waste generated outside the State of South Carolina shall not be included." DHEC Reg. 61-99, III(C). *HWTC I*, 766 F. Supp. at 436.

2. *The State Has Failed To Demonstrate That Any Material Facts Are Genuinely In Dispute*

Defendants argue that material facts remain in dispute which preclude summary judgment and require a trial. As each of the challenged provisions facially discriminates against interstate commerce, however, the State bears the extraordinarily high burden of demonstrating that (1) there is a legitimate local purpose for the discrimination, *and* (2) there are no non-discriminatory alternatives which could serve this purpose. *Wyoming v. Oklahoma*, 112 S. Ct. at 801 (" 'At a minimum such facial discrimination invokes the *strictest scrutiny* of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives' ") (emphasis added), *quoting Hughes*, 441 U.S. at 337; *see also Maine v. Taylor*, 447 U.S. 131, 144 (1986), *quoting Hughes; HWTC II*, 945 F.2d at 790 ("[j]ustifying discrimination is difficult to say the least"). Where, as here, each of the challenged laws "do not regulate evenhandedly but discriminate on their face against out-of-state hazardous waste," *id.* at n. 13, there is a "virtually *per se* rule of invalidity . . . ." *New Energy*, 486 U.S. at 278-79, *quoting Philadelphia v. New Jersey*, 437 U.S. at 624. The burden of overcoming the "virtually *per se*" rule is extraordinarily high, and it has been accomplished only once or twice over the entire history of the Nation.

South Carolina argues that it is entitled to a trial "to exercise its right to adduce evidence in justification of the purpose and basis for its challenged laws." (Memoran-

dum in Opposition at 5). It is the State's position that this Court may not enter summary judgment simply because the Fourth Circuit did not resolve the matter "on the merits" at the preliminary injunction stage. *HWTC II*, 945 F.2d at 789 n. 11.

But this case is no longer at the preliminary injunction stage. In declining, "to decide the case on the merits at the early prelimianry injunction stage," *id.*, the Fourth Circuit property was drawing a distinction between a preliminary injunction motion and a decision on the merits. The present motion is for summary judgment, disposition of which is every bit an adjudication on the merits as a trial.

In particlular, at the summary judgment stage, unlike the preliminary injunction stage, it is not sufficient for South Carolina to simply assert an "intention to produce evidence" at some future time. Rather, the time is now for the State to come forward with actual evidence to carry its burden under "strict scrutiny" and defeat summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256 ("Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial"). This is particularly true where, as here, it must submit enough evidence to overcome the heavy burden of the virtual *per se* rule of invalidity. *See generally Metuskits Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. at 322, 323 ("[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

Thus the State is obligated to demonstrate that there is a material fact genuinely in dispute. Mere incantations will not suffice at this stage of the litigation. Nonetheless

incantations are all the State has provided on the essential issue: why discrimination against interstate commerce is necessary to achieve the State's allegedly legitimate purposes. In particular, South Carolina purports to list in its Memorandum in Opposition to Motion for Summary Judgment "factual matters" that "must be addressed." (Memorandum in Opposition at 9.) All of the factual issues listed in the Memorandum in Opposition and in the State's Statement of Material Facts, however, either (1) are undisputed at this stage (*i.e.*, the State's presumably legitimate purpose, which Plaintiff concedes for purposes of this motion only); (2) are irrelevant to the constitutional issues at hand; or (3) raise questions of law rather than questions of fact.

Assuming arguendo that the State possesses legitimate local purposes for placing certain restrictions on hazardous waste, in order to prevail the State must demonstrate what those goals cannot be achieved without facially violating the commerce clause: "[W]hatever [a state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State *unless there is some reason, apart from their origin, to treat them differently.*" *Philadelphia v. New Jersey*, 437 U.S. at 627 (emphasis added); *see also Wyoming v. Oklahoma*, 112 S.Ct. at 800 (discriminatory laws "will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism") (citations omitted). The fatal flaw in South Carolina's program is that the State has failed even to suggest that it has some basis—other than state of origin —for discriminating against out-of-state waste. In fact, that is the reason for the discrimination. Thus, the State cannot justify such unconstitutional activity under any set of alleged facts.

Certainly Defendants' Statement of Material Facts does contain certain incantations regarding alternatives—"The South Carolina laws reflect the unavailability of neutral

alternatives to achieving the State's legitimate purposes in the pertinent circumstances" (Statement of Material Facts at 2); "The failure of [EPA] and other States to license new or additional commercial land disposal capacity has severely restricted the availability of neutral alternatives for achieving the State's legitimate purposes" (*Id. at 3*). Nowhere in the record, however, is there evidence to support the assertion that neutral alternatives are not available.

Indeed, nowhere in the record has South Carolina argued that hazardous waste from out-of-state is *any different* from hazardous waste generated in-state. As noted by this Court and the Fourth Circuit at the preliminary injunction stage, there is no difference: "[h]azardous wastes generated out-of-state pose no more threat to human health and the environment than hazardous waste generated in South Carolina." *HWTC I*, 766 F. Supp. at 441-42, *quoted in HWTC II*, 945 F.2d at 788. In the absence of a *bona fide* distinction, any effort to discriminate against out-of-state waste solely because it is from out-of-state customers must fail. *See Philadelphia v. New Jersey*, 437 U.S. at 629 (because "there is no basis to distinguish out-of-state waste from domestic waste . . . . [the state's] legislative effort is clearly impermissible under the Commerce Clause . . . .").

The State has not presented any evidence to show the absence of nondiscriminatory alternatives. Although South Carolina has not precisely articulated its purposes, there appear to be several alleged concerns, all of which can be satisfied through nondiscriminatory means.

First, South Carolina mentions its concern for the "health, safety and welfare of its citizens." However, as this Court expressly found (and the Fourth Circuit affirmed), "[h]azardous wastes generated out-of-state pose no more threat to human health and the environment than hazardous wastes generated in South Carolina." HWTC I, 766 F. Supp. at 441-42, *quoted in HWTC II*,

945 F.2d at 788. Accordingly, to the extent the State deems the existing comprehensive federal and State regulatory regimes insufficient to protect public health and safety, the State's interest can be served by *nondiscriminatory* hazardous waste management regulations that are applicable to all waste treated and disposed of within South Carolina. *See Philadelphia v. New Jersey*, 437 U.S. at 629; *accord New Energy*, 486 U.S. at 279.

Second, South Carolina also is concerned with preserving disposal capacity. As the Fourth Circuit held, however, it is impermissible for a state to "accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Philadelphia v. New Jersey*, 437 U.S. at 627; *accord New England Power Ct. v. New Hampshire*, 455 U.S. 331, 338 (1982); *cited in HWTC II*, 945 F.2d at 792 ("South Carolina has little inherent right to use capacity located within its borders solely for waste generated within its borders"). The Commerce Clause thus bars any attempt to "conserve" hazardous waste capacity through discriminatory laws. If South Carolina is truly interested in preserving its in-state capacity, that interest would be served by the *bona fide* evenhanded regulations that apply to in-state and out-of-state waste generators. *See HWTC II*, 945 F.2d at 792 ("South Carolina may preserve the capacity by limiting total disposal and treatment within the state without reference to whether in-state or out-of-state waste is actually involved") (Footnote omitted). Moreover, the Supreme Court recently rejected the argument that protectionist and discriminatory measures are necessary "as landfill space diminishes and environmental cleanup costs escalate. . . ." *Carbone*, 114 S. Ct. at 1683. As the Court held in *Carbone*, there has never been a showing "that the unobstructed flow of interstate commerce itself is unable to solve the local problems" which face all landfills around the country. *Id.*

Third, South Carolina makes mention of vague "transportation risks," again without distinguishing between

wastes generated in-state and those generated out-of-state. There is no evidence that any of the challenged South Carolina laws even address this purported concern. However, even if South Carolina were interested in seeking to minimize the risks associated with transportation of hazardous waste, there would be several nondiscriminatory methods of addressing that interest. For example, South Carolina could increase the stringency of its regulations on an evenhanded basis, effectively addressing the State's putative transportation concerns by not exempting South Carolina waste or waste that is imported through South Carolina. With alternatives available to it, South Carolina cannot force *only* interstate commerce to bear the burden of its purported concerns.

Finally, it appears to be South Carolina's perception that certain other state's are not bearing their "fair share" of hazardous waste treatment and disposal. It thus has tried to influence the public policy of *other* states to compel them to take action. Suffice it to say that punishing other states is not a legitimate purpose under the Commerce Clause. *See HWTC II*, 945 F.2d at 791 (South Carolina does not have the authority "to punish certain hazardous waste generators merely because they reside in states that South Carolina concludes have not fulfilled obligations under CERCLA § 104(e)(9)"). Only Congress has the responsibility and power under the Constitution to impose national policy on individual states. Indeed, for South Carolina to try to impose its will on its neighbors is nothing more than one state making economic warfare on another of its sister states.

As for its purportedly legitimate local purpose, South Carolina asserts a range of general justifications. (See Statement of Material Facts ("South Carolina has legitimate purposes in protecting the health, safety and welfare of its citizens"); ("South Carolina has a legitimate public purpose in taking actions to reduce reliance upon land disposal of hazardous waste"); ("South Carolina has

a legitimate public purpose in taking measures to minimize the transportation of hazardous waste in the State"); ("South Carolina has a legitimate public purpose in taking measures to minimize the disposal of hazardous waste in the State"); ("South Carolina has a legitimate public purpose in carefully regulating the siting of new disposal facilities")).

South Carolina's emphasis on this "purpose," however, misses the point entirely. The general purpose of such laws are largely irrelevant when facial or substantial discrimination is involved. *See Phildelphia v. New Jersey*, 437 U.S. at 626 ("[t]his dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issues to be decided in this case"). Thus, it is "the discrimination [that must be] demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy*, 486 U.S. at 274 (citation omitted). Every time the State grants a preference to in-state waste—by allowing that waste to be disposed in the State, or setting differential quotas, or barring consideration of out-of-state market needs and customers in determining whether a facility may be built or expanded—it is engaged in a form of protectionism the Constitution forbids by granting benefits to its citizens and businesses while denying them to those of other states. A state cannot seek to achieve a "presumably legitimate goal" by " 'the illegitimate means of isolating the State from the national economy.' " *Wyoming v. Oklahoma*, 112 S. Ct. at 361, *quoting Philadelphia v. New Jersey*, 437 U.S. at 627. In other words, even if a state demonstrates a legitimate *purpose* for its laws, those are impermissible if that purpose is accomplished by discriminating *solely* on the basis of origin. Thus, the Supreme Court in *Philadelphia v. New Jersey* found the State's salutary motives irrelevant, stating:

> [I]t does not matter whether the ultimate aim of [the law] is to reduce the waste disposal costs of

> [the State's] residents or to save remaining open lands from pollution, for we assume [the State] has every right to protect its residents' pocketbooks as well as their environment. . . . But whatever [the State's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

437 U.S. at 626-27.

In addition, while it is evident from the alternatives South Carolina chose not to pursue that there are indeed nondiscriminatory alternatives, a close look at the program South Carolina *did* put into place reveals that the actual purpose of the program was to discriminate. In Act No. 590, Section 44-56-59(A)(1) reflects the State's clear and unmistakable efforts to discriminate by voicing concern about "limited resources" for disposal of hazardous waste. The next provision references South Carolina's demand that "the needs of South Carolina are met first" and that disposal facilities in the State must "give preference to hazardous waste generators within the State." *Id.* at (A)(2), (3). In addition, the two executive orders contain "whereas" clauses rife with indicia of the State's true purpose.

B. *Conclusions of Law*

South Carolina is not the only state that has recently discriminated against the interstate waste services market. *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2089 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S.Ct. 2019 (1992); *C&A Carbone, Inc. v. Town of Clarkstown, New York*, 114 S.Ct. 1677 (1994); *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 114 S.Ct. 1345 (1994). *National Solid Waste Management v. Alabama Dep't of Env't*, 910 F.2d 713 (11th Cir. 1990), *cert.*

denied, 111 S.Ct. 2808 (1991). As the Fourth Circuit explained, these attempts to discriminate must fail:

> Perhaps most importantly, the effect of every state designing particular limits and bars for out-of-state waste could be catastrophic. Indeed, such treatment of hazardous waste—in essence, ensured nontreatment of some hazardous waste—might destroy not only the theoretical principle of a national economic union, but contains the real potential to destroy land, if not also persons, within the union.

HWTC II, 945 F.2d at 792 (citation omitted).

If South Carolina were entitled to enforce this program, *every state* could act similarly. The result would be states making economic war on other states in connection with the policies those states choose to pursue for hazardous waste treatment and disposal:

> The practical effect of the [discriminatory] statute must be evaluated not only by considering the consequences of the statute itself, but also considering how the challenged statute may interact with the legitimate regulatory regimes of other states and what effect would arise if not one, but many or every state enacted similar legislation.

Healy v. The Beer Institute, 491 U.S. at 336.

Thus, the constituent parts of South Carolina's program are unconstitutional, because they discriminate against out-of-state interests. Further, because those parts work together to compose an overall discriminatory program the entire program is unconstitutional.

Defendant's essentially agree that the blacklisting laws are invalid. They impose an embargo on *any waste* from generators in certain states. This is exactly the sort of discrimination the commerce clause prohibits:

> South Carolina's Act, No. 196 seems to punish certain hazardous waste generators merely because they

> reside in states that South Carolina concludes have not fulfilled obligations under CERCLA 104(c)(9). But South Carolina does not appear to have been empowered to place penalties on businesses in such states. . . . And its seems unlikely that South Carolina can penalize its own citizens by prohibiting them from participating in interstate commerce with other states' citizens simply because that state has not met its obligations under CERCLA 104(c)(9). The Commerce Clause protects those "engaged in interstate commerce."

HWTC II, 945 F.2d at 791-2 (other citations omitted). Thus, Section 9 of Act No. 196, amending S.C. Code Ann. Section 44-56-130, must be enjoined. In addition, Section 5 of Act No. 196, which requires that preference be given to in-state generators, must also be enjoined. S.C. Code Ann. 44-56-205.

Similarly, all of the operative language of Executive Order No. 89-17 must be permanently enjoined. These provisions mirror Act No. 196 in blacklisting hazardous waste from certain other states and granting a preference for in-state waste.[5]

The quota laws are also invalid. They systematically discriminate against out-of-state businesses by allowing in-state generators to dispose of significantly more hazardous waste than out-of-state generators. Act No. 590 is thus invalid in its entirety. Defendants assert that the so-called "neutral cap" on disposal in Act No. 590 (S.C. Code Ann. 44-56-60(a)(2)) can be "divorced" from the rest of the State's discriminatory program even if the other discriminatory provisions were invalid. Defendants cite

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[5] Plaintiff does not object to the Court's refraining from permanently enjoining the "whereas" sections of E.O. 89-25 and E.O. 89-17, as these do not contain any operative language. Therefore, although these sections do indicate that the operative sections were designed in toto to discriminate, this Court need not enjoin them *per se*.

the Fourth Circuit's *dictum* that, with regard to the preliminary injunction, "South Carolina may preserve the capacity by limiting total disposal and treatment within the state *without reference* to whether in-state or out-of-state waste is actually involved." *HWTC II*, 945 F.2d at 792. As shown above, however, the so-called neutral cap on disposal is set forth in a statute which expressly references discrimination, both in the statute itself and in its references to the blacklisting statute and executive order. *See* Act No. 598, Section 1, amending S.C. Code Ann. 44-56-59, at (A)(4). On that basis, this cap provision cannot be upheld in accord with the Fourth Circuit's mandate. Moreover, the Supreme Court recently held that a discriminatory program cannot be pursued into its otherwise valid but constituent parts. *West Lynn Creamery, Inc. v. Town of Clarkstown, New York*, 114 S.Ct. 2205 (1994). In *West Lynn*, Massachusetts sought to protect state dairy farming from interstate competition. To accomplish this objective, Massachusetts constructed a two-part ["]pricing order" program consisting of a cash/credit subsidy for state farmers and an "even-handed" tax on all dairy producers selling in the state, regardless of the producer's domicile. Analyzed separately, each of the Massachusetts provisions would likely have survived Constitutional challenge, a point the Supreme Court made clear. *Id.* at 2214. Operating together as they did, however, the Court concluded the State had created an overall discriminatory program that could not withstand Commerce Clause scrutiny:

> [Massachusetts] errs in assuming that the constiutionality of the pricing order follows logically from the constitutionality of its component parts. By enjoining a tax and a subsidy, Massachusetts has created a program more dangerous to interstate commerce than either part alone. Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate

> commerce, in part because "[*t*]*he existence of major in state interests adversely affected . . . is a powerful safeguard against legislative abuse. . . .*" However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a *state's political processes can no longer be relied upon* to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax *has been modified by the subsidy.*
>
> * * *
>
> Respondent's argument would require us to analyze separately two parts of an integrated regulation, but we cannot divorce the premium payments from the use to which the payments are put. It is the entire program—not just the contributions to the fund or the distributions from that fund—that *simultaneously burdens interstate commerce and discriminates in favor of local producers.* The choice of constitutional means—nondiscriminatory tax and local subsidy—cannot guarantee the constitutionality of the program as a whole.

Id. at 2214-2215 (citations and footnote omitted). Thus, in *West Lynn Creamery,* the Court struck down all components of the State's discriminatory program, including the so-called neutral tax at issue there.

Similarly, Act No. 590 is invalid in its entirety, including the so-called neutral caps on disposal. Under *West Lynn Creamery*, it is not appropriate to assume that the South Carolina legislature would have enacted the (reduced) 110,000 ton cap in Section 44-56-60(a)(2) *without* the other discriminatory provisions, which reserve substantial disposal capacity for South Carolina generated waste (i.e., 54,000 tons, or 50% more than any other state). The disposal cap was not enacted in a vacuum. To the contrary, in-state generators are *not* adversely effected by the quotas because they received a further benefit at the expense of out-of-state generators. Thus in-state

generators could not and did not serve as a "powerful safeguard against legislative abuse." *Id.*

Finally, Section III(C) of DHEC Regulation 61-99 must be declared invalid and permanently enjoined. It is certainly within DHEC's authority to make certain restrictions with respect to the permitting of new and expanded hazardous waste facilities under RCRA. It is simply beyond the agency's authority, however, to create discriminatory restrictions which consider "in-state needs" only to the exclusion of the needs of *all* the customers who bring waste into South Carolina. It is difficult to conceive of a more obvious effort to hoard the economic resources of a state and to isolate that state from interstate commerce. The Fourth Circuit itself acknowledged the unconstitutionality of this provision, remanding not on the merits of its invalidity, but only on the "balance of hardships" for the issuance of a preliminary injunction. The Fourth Circuit noted that Plaintiff "appears to have a substantial argument that Regulation 61-99 is unconstitutional," *HWTC II*, 945 F.2d at 788, because it:

> . . . appears to be an attempt to *block South Carolina from the nationwide problem. On its face, Regulation 61-99 appears not to regulate evenhandedly.* It permits South Carolina to refuse to allow new construction if all of its waste can be disposed of by exportations. The "practical effect," *Healy*, 491 U.S. at 332, 109 S. Ct. at 2497, *of the regulation may be to favor in-state interests over out-of-state interests.*

HWTC II, 945 F.2d at 791 n. 14 (emphasis added).

South Carolina has a range of administrative, legislative and cooperative remedies available to ameliorate its concerns regarding how other states are dealing with hazardous waste issues. *See generally South Carolina v. Reilly, Admin. of EPA*, No. 91-3090 (D.D.C. filed Nov. 25, 1991) (complaint that Court prevent EPA "from releasing or earmarking federal hazardous waste cleanup funds

under CERCLA to states such as North Carolina whose failure to meet certain statutory conditions renders them ineligible for the funds"). However, South Carolina cannot solve its perceived problem through a program which violates the Commerce Clause.

IV. CONCLUSION

For the foregoing reasons, it is hereby ORDERED.

1. Section 5 and 9 of Act No. 196 of 1989, amending S.C. Code Ann. Section 44-56-205 and Section 44-56-130, are declared invalid and are permanently enjoined;

2. Executive Order No. 89-17, from the words "Now therefore" onward is declared invalid and is permanently enjoined;

3. Act No. 598 of 1990, amending S.C. Code Ann. Section 44-56-59 and S.C. Code Ann. Section 44-56-60 is declared invalid and is permanently enjoined;

4. Executive Order No. 89-25, from the words "Now therefore" onward is declared invalid and is permanently enjoined; and

5. South Carolina Department of Health and Environmental Control Regulation 61-99(III)(C) is declared invalid and is permanently enjoined.

IT IS SO ORDERED.

/s/ Matthew J. Perry
MATTHEW J. PERRY
United States District Judge

Columbia, South Carolina,

April 13, 1995.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-2317

HAZARDOUS WASTE TREATMENT COUNCIL,
on behalf of itself and its members,
Plaintiff-Appellee,

v.

STATE OF SOUTH CAROLINA; CARROLL A. CAMPBELL, JR., Governor of the State of South Carolina; COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Amicus Curiae.

Appeal from the United States District Court
for the District of South Carolina, at Columbia
Matthew J. Perry, Jr., District Judge
(CA-90-1402-3-0)

Argued: May 6, 1991
Decided: September 20, 1991

Before MURNAGHAN and SPROUSE, Circuit Judges, and MURRAY, Senior United States District Judge for the District of Maryland, sitting by designation.

OPINION

MURNAGHAN, Circuit Judge:

The case before us arises on appeal from a preliminary injunction granted to Hazardous Waste Treatment Council ("HWTC")[1] which enjoins South Carolina from enforcing, applying, or attempting to apply portions of two state executive orders, two state statutes, and one regulation, all relating to hazardous waste management. HWTC's contention, seeking declarative and injunctive relief, that the Commerce Clause renders parts of the executive orders and statutes unconstitutional, permitting it to operate free from the constraint of such parts, presents a grave and serious question and we therefore affirm the district court's grant of a preliminary injunction to such an extent. We remand, however, to permit the district court to modify its order to clarify that it neither enjoined aspects of the legislation not implicated by the Commerce Clause argument nor, on the merits, declared the enjoined legislation invalid by reason of the Commerce Clause. In addition, we remand the preliminary injunction inquiry relating to the challenged state regulation to allow the district court to balance the hardships to the parties.

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[1] HWTC is a national association of licensed commercial firms which treat, recycle, and dispose of hazardous waste. Three HWTC members are located within South Carolina.

I.

An amalgam of federal acts, federal regulations, state statutes, state regulations, and court opinions, all addressing the hazardous waste problem, comprise the background of the instant appeal. At the preliminary injunction stage, where the merits have not yet been addressed, we need only sketch the broad outlines that enable us to reach a decision. We first touch upon the federal programs that comprise the background to the appeal. We then explain the South Carolina legislation challenged in the appeal. As our colleagues on the Eleventh Circuit recently wrote, "our job is not to make policy, but to interpret the federal legislation and regulations to determine Congress's intent . . . . We recognize that serious problems associated with hazardous waste management plague our nation; but whatever our own views may be about the effectiveness of what Congress or Alabama has done, we can only apply the law." *Nat'l Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 715-16 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, —— U.S. ——, 59 U.S.L.W. 3783 (1991).

A. *Federal Laws and Regulations*

Fifteen years ago, Congress passed the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. §§ 6901-92k. RCRA establishes a national program for hazardous waste management administered by the Environmental Protection Agency ("EPA"). RCRA encompasses most aspects of hazardous waste management, including identification of waste, standards for generators, transporters, and operators of treatment, storage, and disposal facilities, and procedures for permits. Section 3006(b) of RCRA allows a state to implement its own program "in lieu of the federal program." 42 U.S.C. § 6926(b). No aspect of RCRA is to be "construed to

prohibit any State . . . from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." 42 U.S.C. § 6929. A state's program, however, must be "equivalent to" and "consistent with" the federal program and must provides "adequate enforcement of compliance." 42 U.S.C. § 6926(b). Such a state program, authorized by EPA, "shall have the same force and effect" as action taken by EPA. 42 U.S.C. § 6926(d).

RCRA has been explained and implemented by numerous federal regulations. Of particular concern in the present case, is 40 C.F.R. § 271.4, which implements RCRA § 3006, 42 U.S.C. § 6926:

> § 271.4 Consistency
>
> To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.
>
> (a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.
>
> (b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

> (c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

40 C.F.R. § 271.4.

RCRA attempts to address hazardous waste before it becomes a problem. Congress enacted other federal statutes to deal with the need to cleanup improperly or illegally disposed waste. In 1980, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S. §§ 9601-75, created a fund—*i.e.*, a "Superfund"—of federal money available for state cleanup efforts. Several years later, when it became apparent that local community actions were resulting in little construction or expansion of hazardous waste management facilities, Congress enacted amendments to CERCLA § 104(c), the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613. Of particular importance to the instant appeal, amendment § 104(k) which became CERCLA § 104(c)(9) provided:

> (9) Siting
>
> Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—
>
> (A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agree-

> ment and to be disposed of, treated, or destroyed,
>
> (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
>
> (C) are acceptable to the President, and
>
> (D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.]

42 U.S.C. § 9604(c)(9). Section 104(c)(9) has been construed to require each state to present a Capacity Assurance Plan ("CAP") to EPA.

EPA's Office of Solid Waste and Emergency Response ("OSWER") issued two directives explaining the CAPs. *See* OSWER Directive 9010.00a (Oct. 16, 1989) ("Agency Review of SARA Capacity Assurance Plans"); OSWER Directive 9010.00 (December 1988) ("Assurance of Hazardous Waste Capacity: Guidance to State Officials"). The directives emphasize that waste reduction is the preferred method of addressing hazardous waste problems. *See* OSWER Directive 9010.00a, at 1-2. However, the directives also explain that SARA was enacted to solve the "NIMBY"—"not in my backyard"—problems that arose because of political pressure and public opposition:

> Congress believed that some states were not moving aggressively to create facilities needed to manage hazardous wastes and that this inaction could lead to the creation of additional Superfund sites, even though some wastes might be managed at facilities available in other states. This problem would be exacerbated if the costs of interstate waste management were to rise or if states were to take actions that directly or indirectly impeded interstate waste

> movement. Although any hazardous waste management facilities created would be regulated in an environmentally safe manner under RCRA, existing statutory and regulatory authorities did not adequately address the need to develop and to assure access to such facilities within and among the states.

OSWER Directive 9010.00, at 2; *see Nat'l Solid Wastes*, 910 F.2d at 717. Thus, CERCLA § 104(c)(9) envisions the import and export of hazardous waste to avoid future Superfund cleanup sites along with the construction of new facilities.

As the directives note, "Planning for twenty years of waste generation is not a simple task, particularly when the states will not, in most cases, own the wastes or directly control their generation or disposition." OSWER Directive 9010.00, at 6. Consequently, CERCLA § 104 (c)(9) conditions the receipt of Superfund remedial funds on a state's presentation of a CAP which "assures" twenty-year capacity for in-state generated waste either at in-state facilities or at out-of-state facilities pursuant to an interstate or regional agreement. At least on the materials available to us at the preliminary injunction stage, CERCLA § 104(c)(9) does not appear to contemplate that hazardous waste actually be disposed of according to the CAP. For example, the OSWER directives imply that, for the purposes of the CAP, a state's in-state capacity will be reduced by imported hazardous waste only to the extent that an interstate or regional agreement exists. Hence, it appears that even if fifty percent of South Carolina facilities' capacity actually is used to treat out-of-state waste, unless that percentage occurred pursuant to an interstate or regional agreement, South Carolina can obtain EPA approval for a CAP that allocates the very same capacity to in-state generated waste. The CAP is intended to ensure that, *in theory*, no future cleanup will be required because sufficient sites will exist somewhere to treat and dispose of the waste.

Moreover, CERCLA § 104(c)(9) does not appear to fine a noncompliant state, does not prohibit private parties from importing or exporting hazardous waste in the absence of an interstate or regional agreement, does not establish equal distribution requirements for hazardous waste facilities among the states, and does not introduce percentage limits on in-state and out-of-state waste. The only penalty faced by a state that refuses to comply with CERCLA § 104(c)(9) is disqualification for Superfund money.

B. *South Carolina's Legislation*

In 1985, EPA gave South Carolina RCRA authorization to operate its program.[2] In 1989, South Carolina began to execute the two state statutes, two executive orders, and one state regulation that are the subject of the instant appeal.

1) Act No. 196 of 1989, enacted June 14, 1989, requires that South Carolina hazardous waste treatment and disposal facilities give preference to in-state generators,[3]

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[2] At that time EPA approved the program despite an argument that the program was "inconsistent." South Carolina's program contained a fee schedule that placed a higher fee for disposal of waste generated outside the state than for that domestically generated. EPA concluded that the statute did not render the program "inconsistent" under RCRA. 50 Fed. Reg. 46437 (1985). EPA explained that it "intended 'unreasonable restrictions or impediments' to render State programs inconsistent," 50 Fed. Reg. 46438 (1985), and the fee differential was not unreasonable. As far as we know, the South Carolina fee differential has not been challenged under the Commerce Clause and is not challenged in this case. *Cf. Nat'l Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991) (finding unconstitutional a state statute levying higher taxes on out-of-state solid wastes).

[3] "All hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials at licensed facilities in the State." S.C. Code Ann. § 44-56-205; Act No. 196 § 5.

and prohibits "any person who owns or operates a waste treatment facility within this State" from accepting

> any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act.

S.C. Code Ann. § 44-56-130(4); Act. No. 196 § 9.

Executive Order 89-17 is basically an earlier version of Act No. 196. It provides a mandatory preference for in-state generators and prohibits the acceptance of hazardous waste from out-of-state generators where such disposal is banned.[4]

2) Act No. 590 requires that a permit be obtained before operating a hazardous waste facility. The act limits the amount of hazardous waste that may be disposed of by burial.[5] More waste may be buried upon certification, provided that disposal "is necessary to protect the health and safety of the people of this State" or "at least one hundred ten thousand tons of hazardous waste disposed of by land burial in this State during the twelve-month period was generated in South Carolina." S.C. Code Ann. § 44-56-60(a)(3). In addition, during each period,

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[4] Executive Order 89-17 extends and amends an earlier executive order, 89-03, promulgated on January 19, 1988:

> No person who owns or operates a disposal facility in this State shall accept hazardous waste which is generated in another State and is banned or prohibited for disposal by any statute, regulation or administrative decision of the State.

[5] From July 1, 1990 to July 1, 1991, hazardous waste disposal sites are restricted to one hundred twenty thousand tons of waste per twelve months. After July 1, 1991, the restriction drops to one hundred ten thousand tons.

> a person operating a hazardous waste disposal facility or site shall reserve at least the same capacity to dispose of hazardous waste generated in South Carolina that was disposed of by burial at that facility or site during the previous year . . . . No more hazardous waste from out of state shall be buried in South Carolina than was buried in the previous twelve-month period.

Id.

3) Executive Order 89-25, promulgated on July 6, 1989, requires in-state disposal facilities to reserve "54,000 tons per year of the statutory maximum of 135,000 tons per year for South Carolina generated waste" and to limit the waste from any one state to 35,000 tons, at the rate of 10,000 tons per quarter.

4) South Carolina Department of Health and Environmental Control ("DHEC") Regulation 61-99, effective January 12, 1990, requires "applicants for permits to establish or expand facilities for treatment, storage, or disposal of hazardous waste," Reg. 61-99(I)(B), to demonstate "need." "Need" cannot include hazardous waste generated outside of South Carolina. Reg. 61-99 (III)(C).

In response to an EPA request on July 6, 1989, South Carolina provided a South Carolina Attorney General Opinion that Executive Order 89-17 and Act No. 196 were "consistent" under 40 C.F.R. § 271.4(a). In reaching that decision, the Attorney General concluded that, because the statute appeared constitutional under Commerce Clause analysis, it was "consistent." The Attorney General, however, noted that the portion of Act No. 196 challenged here on appeal raised a "more difficult legal question" under Supreme Court jurisprudence. No response by EPA appears in the record.

Copies of some of the legislation, including Act No. 196 and the two executive orders, were also submitted to

EPA on October 17, 1989 as part of South Carolina's effort to gain approval of its CAP under CERCLA § 104 (c)(9). South Carolina also included a copy of a SARA Capacity Assurance Regional Agreement with Tennessee, Kentucky, and Alabama.[6] With little comment, on May 10, 1990, EPA approved the CAP.

On June 28, 1990, HWTC filed suit against the State of South Carolina, its governor, and certain state agencies, for declaratory and preliminary and permant injunctive relief. HWTC alleged that the statutes, orders, and regulations violated the Commerce Clause, the Privileges and Immunities Clause, the Supremacy Clause, and 42 U.S.C. § 1983. In addition, HWTC filed a motion for preliminary injunction. South Carolina moved for partial dismissal of all but the Commerce Clause claims and argued abstention as a basis for dismissal of the Commerce Clause claims with respect to Regulation 61-99.[7]

On September 27, 1990, the district court heard the motions for preliminary injunction and partial dismissal based on affidavits and documentary materials. On December 18, 1990, the district court issued a temporary restraining order to stop South Carolina from prohibiting hazardous waste from North Carolina.[8]

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[6] North Carolina joined the Agreement; however, that state's participation depended on the construction or permitting of certain new facilities.

[7] Sierra Club, Energy Research Foundation, Citizens for Clear Air and Water, Environmentalists, Inc., and Citizens Asking for a Safe Environment, Inc. (collectively "Sierra Club") filed a motion to intervene as party defendants with respect to the argument over Regulation 61-99. The district court denied the motion on January 15, 1991. Sierra Club's appeal to this court is No. 91-2331.

[8] The proceedings giving rise to the temporary restraining order illustrate the complexities of South Carolina's and HWTC's positions. North Carolina had been a party to the regional agreement provided it created additional hazardous waste facilities, including undertaking the permitting for an incinerator by December 31, 1990. In mid-December 1990, North Carolina's Council of State

On January 11, 1991, the district court issued a preliminary injunction against South Carolina and denied South Carolina's motion for partial dismissal.

II.

In this circuit, the criteria to be examined when confronting a motion for a preliminary injunction and the appellate review of a district court's grant of a preliminary injunction are well settled. A grant of preliminary injunction is " 'discretionary with the district court and may not be set aside on appeal unless an abuse of discretion is shown.' " *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th Cir. 1991) (citation omitted). The *Blackwelder* standard governs the imposition of a preliminary injunction. *See Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189 (4th Cir. 1977). Remembering that minimization of change in the *status quo* and not decision on the merits of the controversy is the objective, a court considers four factors:

> (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,
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> (2) the likelihood of harm to the defendant if the requested relief is granted,
>
> (3) the likelihood that the plaintiff will succeed on the merits, and

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apparently rejected the transfer of certain state lands for this purpose. South Carolina's governor promptly sent a letter advising the governor of North Carolina that North Carolina would be automatically eliminated from the regional agreement. Under the legislation at issue in this appeal, South Carolina facilities would be prohibited from accepting hazardous waste from North Carolina.

Both South Carolina and HWTC allegedly have petitioned the EPA to withdraw North Carolina's RCRA authority and eligibility for Superfund money. HWTC apparently petitioned the EPA for withdrawal because of a North Carolina statute, S.B. 114, which was alleged to preclude construction of certain hazardous waste facilities. The EPA, however, denied the request. The District of Columbia Court of Appeals is currently considering HWTC's appeal from the EPA's denial (No. 90-1443).

(4) the public interest.

L.J. By and Through Darr v. Massinga, 838 F.2d 118, 120 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989). If the balance of the first two factors " 'tips decidedly' in favor of the plaintiff," *Rum Creek Coal*, 926 F.2d at 359 (citation omitted), and " 'the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation,' " *id.* (*quoting Blackwelder*, 550 F.2d at 195), the court shall grant a preliminary injunction.

Some confusion appears as to the scope of the preliminary injunction granted in the instant case. South Carolina claims that the district court's preliminary injunction covered provisions not even arguably unconstitutional under the Commerce Clause. In addition, the state contends that the district court erroneously declared the legislation "invalid." With respect to the latter contention, the district court's memorandum opinion makes clear that it did not intend to declare "invalid" the challenged legislation. The use of the word "invalid" appears to have been a technical mistake and the district court should modify the order by striking the words "which this Court declares are invalid." Order (Jan. 11, 1991), at 2.

We agree with South Carolina that the district court should limit the preliminary injunction to those aspects of the challenged legislation that present Commerce Clause questions. Once again, we believe that the district court's intent was to enjoin only those aspects specifically addressed in the court's memorandum opinion. Specifically, the preliminary injunction properly extends to provisions relating to preference for in-state waste, prohibitions, limits, or other restrictions on the acceptance of certain out-of-state waste, and permitting restrictions referring to out-of-state waste or limiting need to in-state waste.[9]

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[9] The pertinent provisions appear to be (1) Act No. 196, §§ 5 and 9, amending S.C. Code Ann. §§ 44-56-205 and 44-56-130; (2)

On appeal, the parties have focused their energy on the district court's conclusion that HWTC would likely succeed on the merits. However, we first must address the balance of the hardships prong of *Blackwelder*. The district court found that HWTC's members, inside and outside of South Carolina, would be injured by the challenged aspects of the legislation. Not only would the members within the state lose revenue from out-of-state sources but they would be required to chose among out-of-state sources. Similarly, out-of-state members would be required to find, "if possible," other treatment and disposal facilities. We agree with the district court's analysis assessing the likelihood of harm so far as it relates to the statutes and executive orders. They alter the ability of HWTC's members to import or export hazardous waste at existing facilities. The harm to South Carolina is less substantial because, as the district court noted, "[h]azardous wastes generated out of state pose no more threat to human health and the environment than hazardous waste generated in South Carolina."

More troubling, however, is the district court's analysis of Regulation 61-99. Only one sentence was devoted to

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similar provisions in Executive Order 89-17; *i.e.*, any related aspects of the preamble; page 4, fifth full paragraph, first sentence, beginning "no person . . ." to page 5, fourth full paragraph, first sentence, ". . . State."; (3) Executive Order 89-25, any related aspects of the preamble; page 3, seventh paragraph, first sentence, beginning, "hazardous . . . tons."; page 4, first full paragraph; (4) Act No. 590, 1, in specific, § 44-56-59(A), (B)(2), § 2, in specific, § 44-56-60(a)(3)(B), with the exception of the final paragraph, "Certification . . . site."

The district court should modify accordingly the preliminary injunction, thus limiting it. We do not believe that the parties are in disagreement on this issue. If disagreement arises over our *exclusion* of any particular provision, the district court should address it in a manner consistent with our opinion.

Because, as discussed below, we remand the preliminary injunction inquiry with respect to Regulation 61-99, we do not consider here the necessary scope of any possible eventual preliminary injunction of it.

harm caused by Regulation 61-99: "[t]he in state need requirement contained in the permit regulation also has injured the business interests of plaintiff's South Carolina members." "The rationale behind a grant of a preliminary injunction has been explained as preserving the *status quo* so that a court can render a meaningful decision after a trial on the merits." *Rum Creek Coal*, 926 F.2d at 359. If Regulation 61-99 is not enjoined, the district court's analysis does not make clear whether or not HWTC will suffer irreparable harm. Even if Regulation 61-99 turns out to be unconstitutional, any particular member who seeks a permit during the pending litigation may be able to obtain it under the current requirements if, for example, in-state need exists. However, if Regulation 61-99 turns out to be constitutional, South Carolina may be stuck with an unnecessary facility that obtained a permit during the pendency of the litigation. On the other hand, if litigation were to take so long that the absence of a new facility to handle waste, including out-of-state waste, would create irreparable harm, not only to HWTC but to the public, because of the possible creation of additional untreated waste, then the balance might tip the other way on a reapplication for temporary injunctive relief. Thus, although as we note below, HWTC appears to have a substantial argument that Regulation 61-99 is unconstitutional, we cannot uphold the temporary injunction as it relates to Regulation 61-99 in the absence of evidence that the district court engaged in a specific test of the balance of the hardships. We remand to permit the district court to consider the hardships.[10]

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[10] South Carolina argues that the district court erred in refusing to abstain from ruling on Regulation 61-99. We affirm the district court's ruling. We note that because of our ruling in No. 91-2331 the district court should consider whether Sierra Club may intervene in the case, and we have considered Sierra Club's arguments on the issue either as an intervenor or *amicus curiae*. Abstention under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), was not applicable because the issue of whether parts of Regulation 61-99 violate the Commerce Clause will not be

Nevertheless, because the balance of the first two factors appears to "tip decidedly" in favor of HWTC in the case of the statutes and executive orders, we reexamine HWTC's likelihood of success only to discover whether it has shown " 'grave or serious' questions for litigation." *Rum Creek Coal*, 926 F.2d at 363. As this Circuit has often repeated, " 'We of course venture no opinion as to facts that should be found, nor upon whether and how

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" 'mooted' " or " 'presented in a different posture by a state court determination of pertinent state law.' " *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (citation omitted). Regulation 61-99(III)(C) prohibits involving out-of-state generation to show "need." The meaning of Regulation 61-99 is not "unsettled." *Virginia Hosp. Ass'n v. Baliles*, 868 F.2d 653, 664 (4th Cir. 1989), *aff'd sub nom. Wilder v. Virginia Hosp. Ass'n*, —— U.S. ——, 110 S.Ct. 2510 (1900). And "questions of state law" will not dispose of the case. *Gordon v. Luksch*, 887 F.2d 496, 497 n.2 (4th Cir. 1989).

Similarly, abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), was not appropriate. Although Regulation 61-99 is part of a complex state regulatory scheme, determining the constitutionality of Regulation 61-99 does not present " 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case . . . .' " *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*") (citation omitted). Nor will " 'the exercise of federal review of the question . . . be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *Id.*; *see Gordon*, 887 F.2d at 497 n.2.

Abstention under *Younger v. Harris*, 401 U.S. 37 (1971), applies predominantly to cases involving state criminal proceedings. *See Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 1479 (1990); *Gordon*, 887 F.2d at 497 n.2. *Younger* abstention may be proper in rare cases involving other state proceedings; however, none of the factors suggested in *NOPSI*, 491 U.S. at 364-73, exist here. Exceptional circumstances commanding abstention not being present, the district judge properly refused to abdicate federal jurisdiction over the constitutional questions. *See NOPSI*, 491 U.S. at 358.

any facts that may be found will invoke the controlling doctrine.' "[11] *Id.* at 367 (citation omitted).

South Carolina, arguing for disposition in its favor, has asserted that RCRA and CERCLA § 104(c)(9) embody a congressional exercise of the commerce power rendering irrelevant dormant Commerce Clause analysis. The state claims that Congress specifically left states free to regulate hazardous waste subject to EPA oversight. Thus, South Carolina contends that EPA's regulation implementing RCRA § 3006 establishes the only standard applicable to the case: whether or not the statutes, orders, and regulation act otherwise as an unreasonable restriction, impediment, or ban on interstate movement of hazardous waste. South Carolina contends that its legislation is reasonable because CERCLA § 104(c)(9)(A) requires that the state provide assurance that it has capacity, either in-state or through regional or interstate agreements, to treat or dispose of all hazardous waste generated in the state for the next twenty years and it can only do so by reserving some capacity for in-state waste. However, that approach's application here is by no means crystal clear.

HWTC argues that the statutes, orders, and regulation violate the Commerce Clause. HWTC contends that Congress' enactment of legislation concerning hazardous waste did not authorize states to engage in actions that would, in the absence of such legislation, burden interstate commerce.

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[11] HWTC has urged us to decide the case on the merits. We decline to do so as facts remain in dispute. *See Rum Creek Coal*, 926 F.2d at 359. For example, we have found confusing the posture of the EPA with respect to state activities considered permissible under 40 C.F.R. § 271.4 and its standards and procedures for withdrawal of state RCRA authority and refusal of Superfund money. In addition, it appears that the complexities inherent in the hazardous waste situation would make perilous any attempt to decide the case on the merits at the early preliminary injunction stage.

The Commerce Clause [12] "directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). The negative or dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 273-74. Thus the Clause is a " 'substantive restriction on permissible state regulation' of interstate commerce." *Dennis v. Higgins*, —— U.S. ——, 111 S.Ct. 865, 870 (1991) (*quoting Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979)).

If the challenged statute "clearly discriminate[s] against interstate commerce," *New Energy Co.*, 486 U.S. at 274, the court must strike it down, "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Id.* at 274. Justifying discrimination is difficult to say the least. The Supreme Court's acceptance of such discrimination has been focused on commerce bearing the threat of death or disease. *See, e.g., Maine v. Taylor*, 477 U.S. 131 (1986) (upholding Maine's prohibition on importing live baitfish because of the potential for destruction of Maine's fisheries); *Clason v. Indiana*, 306 U.S. 439 (1939) (upholding Indiana's prohibition on importing dead animals because of the potential for disease). In general, a " 'virtually *per se* rule of invalidity' " applies. *New Energy Co.*, 486 U.S. at 278-79 (*quoting Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)); *Maine*, 477 U.S. at 148. " 'When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.' " *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 337

[12] "Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3.

n.14 (1989) (*quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)). If, however, the statute "has only indirect effects on commerce and regulates evenhandedly," *id.*, the statute will be upheld unless the burdens are " 'clearly excessive in relation to the putative local benefits.' " *Maine*, 477 U.S. at 138 (*quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Congress, of course, may permit the states to engage in practices otherwise unconstitutional under the Commerce Clause. *Maine*, 477 U.S. at 138. Parties seeking to argue that Congress has authorized the otherwise invalid legislation face a heavy burden. The Supreme Court has held that before a federal statute will be so interpreted, "[a]n unambiguous indication of congressional intent is required," *Maine*, 477 U.S. at 139, congressional direction must be "unmistakably clear," *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) or "a clear expression of approval by Congress" must be shown. *Id.* at 92. That requirement is not idly commanded. Without the requirement, " 'the risk that unrepresented interests will be adversely affected by restraints on commerce' " "unacceptably increases." *Maine*, 477 U.S. at 139 (*quoting South Central Timber*, 467 U.S. at 92). Nor may we idly disregard it. "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) (citations omitted); *see South Central Timber*, 467 U.S. at 92.

We first consider whether, in the absence of congressional action, the challenged parts of executive orders and statutes may violate the Commerce Clause. The argument, at the early preliminary injunction stage at least, that they do so is by no means devoid of merit. They

appear facially to discriminate against out-of-state hazardous waste.[13] They compel in-state facilities to give preference to in-state waste, to reserve a specific amount of in-state capacity for in-state waste, to limit the acceptance of out-of-state waste to certain amounts, and to bar waste from specific states.

South Carolina has not banned all out-of-state waste but, on full development on the merits, that may prove to be of little relevance. *See Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 375 (1976); *Nat'l Solid Wastes*, 910 F.2d at 720. South Carolina appears to have attempted "to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."[14] *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978).

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[13] South Carolina has not attempted to argue that hazardous waste is not an object of commerce. The argument would appear untenable. *See Nat'l Solid Wastes*, 910 F.2d at 718-19.

Because the executive orders and statutes do not regulate evenhandedly but discriminate on their face against out-of-state hazardous waste, the analysis used in *Pike* does not apply. *See Healy*, 491 U.S. at 337 n.14. *J. Filiberto Sanitation, Inc. v. State of N.J. Dep't of Envtl. Protection*, 857 F.2d 913 (3d Cir. 1988), cited by South Carolina, applied the *Pike* test to a county plan where the plaintiff failed to show that the plan was protectionist, placing the burden on out-of-state interests. *Id.* at 919-22.

[14] Although we have remanded Regulation 61-99 to the district court, we note that the requirement that private groups seeking to obtain in South Carolina a permit to construct a new hazardous treatment facility must demonstrate "need" where "need" may not include out-of-state need (even that pursuant to a regional or interstate agreement to which South Carolina is a party) and must consider the reduction of in-state need by exportation, appears to be an attempt to block South Carolina from the nationwide problem. On its face, Regulation 61-99 appears not to regulate evenhandedly. It permits South Carolina to refuse to allow new construction if all of its waste can be disposed of by exportation. The "practical effect," *Healy*, 491 U.S. at 352, of the regulation may be to favor in-state interests over out-of-state interests. All in all, however, the issue is too complex and possibly fact-dependent to

Act No. 196 bears a marked resemblance to an Alabama statute recently struck down by the Eleventh Circuit as violative of the Commerce Clause. The Alabama statute barred the acceptance of waste from states that either prohibited in-state disposal or treatment of the waste or had not signed an interstate or regional agreement to which Alabama was a party. *Nat'l Solid Wastes Management v. Alabama Dep't of Env't.*, 970 F.2d 713, 717 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, —— U.S. ——, 59 U.S.L.W. 3783 (1991). South Carolina's statute does not require that South Carolina be a signatory to the required interstate or regional agreement; however, it appears doubtful that the distinction, after full factual development, will prove significant. The Supreme Court has refused to vary "the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected . . . ." *New Energy Co.*, 486 U.S. at 276.

The rationales advanced for South Carolina's Act No. 196 seem insufficient, if the question were addressed at the preliminary injunction stage, to save it. Unlike many states that have attempted to pass reciprocity provisions, because South Carolina will permit the acceptance of out-of-state waste without regard to South Carolina's *actual* approval as signatory, Act No. 196 does not seem driven by concerns over other states' inferior standards that may jeopardize South Carolina's citizens' health. *See, e.g., Great Atl. & Pac. Tea*, 424 U.S. at 366; *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (finding reciprocity provisions unconstitutional despite assertion of health standard rationale) South Carolina also may be unable to present more convincing support for the sort of conservation and preservation argument ultimately found unconstitutional in *Sporhase v. Nebraska*, 458 U.S. 941

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allow determination on the merits at the preliminary injunction stage.

(1982). South Carolina's Act No. 196 seems to punish certain hazardous waste generators merely because they reside in states that South Carolina concludes have not fulfilled obligations under CERCLA § 104(c)(9). But South Carolina does not appear to have been empowered to place penalties on businesses in such states. *See Great Atl. & Pac. Tea,* 424 U.S. at 380 ("Mississippi is not privileged under the Commerce Clause to force its own judgments as to an adequate level of milk sanitation on Louisiana at the pain of an absolute ban on the interstate flow of commerce in milk."). And it seems unlikely that South Carolina can penalize its own citizens by prohibiting them from participating in interstate commerce with other states' citizens simply because that state has not met its obligations under CERCLA § 104(c)(9). The Commerce Clause protects those "engaged in interstate commerce." *Dennis,* 111 S.Ct. at 872. South Carolina's desire to have all states follow federal requirements for Superfund money is understandable, perhaps even laudable. It remains, after full factual development, to be decided whether such desire can be fulfilled at the expense of imparing the interstate commerce rights of individuals.

With respect to the remaining legislation, South Carolina seems unlikely to meet the burden of showing that burying in-state hazardous waste rather than out-of-state waste advances the health and safety of South Carolina citizens. "[T]here is no basis to distinguish out-of-state waste from domestic waste." *City of Philadelphia,* 437 U.S. at 629. South Carolina argues that it should be able to preserve its in-state capacity. The burden, however, "of conserving the State's remaining landfill space" should not fall disporportionately on out-of-state interests. *Id.* at 628. South Carolina has little inherent right to use capacity located within its borders solely for waste generated within its borders. *See New England Power,* 455 U.S. at 338 ("Our cases consistently have held that the Commerce Clause . . . precludes a state from mandating that its residents be given a preferred right of access, over

out-of-state customers, to natural resources located within its borders or to the products derived therefrom."); *City of Philadelphia*, 437 U.S. at 627 ("a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders"). South Carolina may preserve the capacity by limiting total disposal and treatment within the state without reference to whether in-state or out-of-state waste is actually involved.[15] But in a national economy filled with benefits and burdens, South Carolina may not be permitted to stop the flow of hazardous waste at its time of treatment and disposal at the borders.

Perhaps most importantly, the effect of every state designing particular limits and bars for out-of-state waste could be catastrophic. *See Healy*, 491 U.S. at 339-40. Indeed, such treatment of hazardous waste—in essence, ensured nontreatment of some hazardous waste—might destroy not only the theoretical principle of a national economic union, but contains the real potential to destroy land, if not also persons, within the union. Unless and until Congress alters the law, the apparent congressional intent of RCRA and SARA would seem to remain—better that hazardous waste be treated and disposed of somewhere, even if spread disproportionately among the states, than that future Superfund sites arise.

The challenged aspects of the executive orders and statutes, standing alone, may almost certainly prove to violate the Commerce Clause; however, South Carolina argues that either RCRA or CERCLA § 104(c)(9) authorize the otherwise invalid legislation. At the preliminary injunction stage, RCRA and CERCLA § 104(c)(9),

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[15] As we understand CERCLA § 104(c)(9), so long as South Carolina has theoretical capacity for its generated waste, South Carolina can continue to meet the requirements by refusing to sign interstate agreements to import additional waste. As we have remarked earlier, once theoretical capacity has been ensured, CERCLA § 104(c)(9) does not address the problem of where the waste actually goes.

however, do not appear to contain any language that indicates an unmistakably clear congressional intent to permit states to burden interstate commerce. *South Central Timber*, 467 U.S. at 91-92; *Nat'l Solid Wastes*, 910 F.2d at 721-22. Moreover, South Carolina has not as yet presented evidence from the legislative history of the two statutes that demonstrate such congressional intent.[16] *Maine*, 477 U.S. at 139. As in *New England Power*, "[n]othing in the legislative history or language of the statute evinces a congressional intent 'to alter the limits of state power otherwise imposed by the Commerce Clause . . . .'" 455 U.S. at 341 (citation omitted).

Lacking such support, South Carolina argues that the EPA's explanation of 40 C.F.R. § 271.4 is persuasive on this point. We are by no means prepared to accept that theory at the preliminary injunction stage as persuasive, nevermind, dispositive. EPA may deserve deference in its construction of its own regulations but it does not necessarily deserve deference with respect to whether Congress authorized it to permit states to violate the Commerce Clause.[17] As yet, no evidence indicates that Congress

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[16] *Northeast Bancorp. Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985) does not indicate that the Supreme Court applies a different test to determine redefinition of the negative or dormant Commerce Clause. Extensive evidence about congressional intent through the legislative history of the bill was introduced. *Id.* at 168-73. Moreover, *Northeast Bancorp* employed the "plainly authorizes" rubric. *Id.* at 173.

[17] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1983) does not mandate or even suggest a contrary result. South Carolina quotes *Chevron*'s statement that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Where no clear congressional intent to redefine the negative or dormant commerce clause can be found, an agency's answer that the negative Commerce Clause has been redefined is not "permissible." In such a case, Congress has not implicitly or "explicitly left a gap for the agency to fill. . . ." *Id.*

intended to permit the states, directly or by EPA authorization, to engage in actions otherwise violative of the Commerce Clause.

Furthermore, EPA's published position on § 271.4 does not suggest a contrary conclusion. After *City of Philadelphia* was decided, EPA adopted § 271.4 on May 19, 1980. The EPA explained the theory behind the section:

> This section provides that any aspect of a State program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent. A recent court decision, *City of Philadelphia*, 437 U.S. 617 (1978), has held that such statutes are unconstitutional because they violate the interstate commerce clause, and EPA believes that decision is correct. However, since the text of RCRA speaks only to the "inconsistency" of State program submissions, not of State laws generally, this provision is restricted to the same extent.
>
> EPA believes that State requirements which forbid the construction or operation of hazardous waste disposal facilities could be subject to attack by the same reasoning adopted by the courts that have struck down transportation bans. A State that refuses entirely to allow a necessary part of national commerce—the disposal of hazardous wastes—to take place within its boundaries is impeding the flow of interstate commerce just as much as a State that refuses to allow the transportation of those wastes. The interstate commerce concerns involved here are underlined by the establishment through RCRA of a national regulatory scheme, even though that scheme is not on its face preemptive. Accordingly, State programs which contain provisions that prohibit treatment, storage or disposal of hazardous wastes within the State will be deemed inconsistent if the prohibition has no basis in human health or environmental protection.

45 Fed. Reg. 53395 (1980). Thus, EPA's initial explanation of § 271.4 indicated that it intended to use the "consistency" prong of RCRA to refuse to authorize a state program if any aspect of it might prove unconstitutional under the Commerce Clause. Moreover, the initial statement implied that EPA intended to extend the reasoning underlying *City of Philadelphia* to in-state construction bans. Even if courts were to find such bans constitutional, EPA may have hoped to claim the authority to refuse to authorize programs containing them.

South Carolina notably glosses over the initial statement and relies heavily on EPA's position five years later.[18] Admittedly, EPA's interpretation of § 271.4 has "altered" somewhat. For example, the second EPA explanation describes the first statement: "The Agency stated that any aspect of the program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent. The Agency noted that this position was supported by a court decision, *City of Philadelphia v. New Jersey* . . ." 50 Fed. Reg. 46438 (1985). However, the initial statement had implied that § 271.4(a) and EPA's decision that bans would be "inconsistent" was the *result of City of Philadelphia.*

Yet, in its later statement no longer does EPA seem to suggest that it will refuse to authorize programs containing laws or other elements that might be declared unconstitutional. Instead, EPA appears to have decided that not all restrictions would violate *City of Philadelphia*'s virtually *per se* rule of invalidity. EPA claimed,

> Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable. Reasonable restrictions or impediments can logically include those that do not significantly

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[18] The second explanation accompanied EPA's RCRA authorization of South Carolina's program despite that state's imposition of a fee differential on in-state and out-of-state waste.

> decrease the flow of hazardous waste. Therefore, EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. . . . [T]he preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impremissible [sic] restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.
>
> More stringent requirements are expressly permitted [and] . . . may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. . . . The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se*. . . . Congress gave EPA the authority to interpret the term "consistent;" the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. Nothing in RCRA section 3006(b) . . . requires the Agency to adopt the Constitutional test as the test for consistency or unreasonable restrictions or impediments.

50 Fed. Reg. 46439 (1985). We are still unsure, however, of whether EPA was attempting to state (1) that some disparities might be constitutional, (2) that even if the disparities would be unconstitutional, EPA could approve the programs as "consistent," or (3) that EPA had the authority to permit otherwise unconstitutional state actions.

We need not struggle to resolve the import of the ambiguous second statement for the Constitution, RCRA, and the dictates of the Supreme Court sufficiently answer

our problem. States may not engage in economic protectionism and RCRA appears to contain no clear statement or indication of legislative intent to permit states to override the Constitution. EPA may change its interpretation of its own regulation; however, we cannot change the commands of the Constitution and Congress. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 n.9 (1983).[19]

CERCLA § 104(c)(9) also does not appear to contain a clear authorization either in the statute itself or its legislative history South Carolina argues that § 104(c)(9) authorizes it to guarantee in-state capacity. But § 104 (c)(9) contains no such provision. Section 104(c)(9) requires an "assurance" of twenty-year availability of arranged adequate capacity. It does not state that the state must ensure that hazardous waste actually is treated and disposed of either in-state or pursuant to an interstate or regional agreement. CERCLA § 104(c)(9) contemplates that adequate national capacity will exist if each state can assure that it has adequate capacity for in-state generated waste after taking into consideration out-of-state waste that it has agreed to import and in-state waste that it has agreed to export. However, no part of § 104 (c)(9) appears to permit or require a state to limit its actual in-state capacity to in-state waste to receive Superfund money. *See* OSWER Directive 9010.00a at 4, 6. In fact, it appears that, if a state refuses to build in-state facilities or make alternate arrangements, it will be denied Superfund money, even if, in reality, all in-state generated waste is safely exported. If congressional intent had been to subject citizens of recalcitrant states to environmental danger by barring export of otherwise untreated and undisposed of hazardous waste, it could have been easily made clear. "A state not in compliance with this section

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[19] The Attorney General, with EPA's Office of General Counsel, listed as "Of Counsel," though appearing as an *amicus curiae* in the present case, has raised no contrary contention.

may not export any waste." In the absence of such intent, we suspect that Congress believed the penalty of no access to federal Superfunds for waste cleanup would be sufficient. *See Nat'l Solid Wastes*, 910 F.2d at 721-22.

RCRA and CERCLA § 104(c)(9) do not appear to evince congressional intent to redefine the Commerce Clause. Long have we held that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935); *see Healy*, 491 U.S. at 337 n.12. The acknowledged problems of hazardous waste do not compel us at the preliminary injunction stage to abandon this vision.[20]

We have dealt at some length with the questions the parties, especially South Carolina, have to face when they proceed to a decision on the merits. We do not decide them but merely address the *Blackwelder* factors. We conclude that likelihood of irreparable harm to the plaintiff will be measurably greater if the preliminary injunction (as modified) is denied. Facts yet to be raised may differently invoke the controlling doctrine. *See Rum Creek Coal*, 926 F.2d at 367. " 'We hold only that the questions of fact and law raised on the record at this point are, under controlling doctrine, sufficiently serious and grave ones that, when considered with the balance of potential harms, the district court's injunctive order should stand pending trial.' " *Id.* (citation omitted). Accordingly, we remand in part to allow the district judge (1) to modify the order by striking the words that confus-

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[20] Because we find Commerce Clause analysis sufficient to justify the preliminary injunction, we do not consider the Supremacy Clause argument briefly addressed on appeal. The Privileges and Immunities Clause claim was not addressed by the district court and has not been argued on appeal. If the district court were to find the Commerce Clause requirement against Regulation 61-99 unlikely to succeed, the court should also consider these other claims of constitutional dimension.

ingly imply a declaration of invalidity, (2) to modify the order to apply only to the specific portions of the executive orders and statutes challenged as violating the Commerce Clause, and (3) to consider explicitly the balance of hardships with respect to Regulation 61-99. We affirm the remainder of the opinion.

AFFIRMED IN PART; REMANDED IN PART

APPENDIX D

[Filed Jan. 11, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
(Columbia Division)

C.A. No. 3.90-1402-0

HAZARDOUS WASTE TREATMENT COUNCIL,
Plaintiff,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Defendants.

PRELIMINARY INJUNCTION AND ORDER

Upon consideration of Plaintiff's Motion for Preliminary Injunction, Defendants' Opposition, and the entire record in this case, it appearing that:

(1) Plaintiff is likely to succeed on the merits of its claim that the South Carolina laws at issue violate the Commerce Clause (U.S. Const. art. I, § 8, cl.3) and the Supremacy Clause (U.S. Const. art. IV, cl. 2), including 40 C.F.R. § 271.4; and

(2) Plaintiff and its members will suffer irreparable harm in the absence of a preliminary injunction in that the commercial firms which are Plaintiff's members have been and are being adversely affected by the South Carolina laws at issue and have no adequate remedy at law; and

(3) Defendants will not be harmed by issuance of a preliminary injunction; and

(4) The public interest will be served by the issuance of a preliminary injunction,

it is this 11th day of January 1991,

ORDERED that the motion is hereby granted. A preliminary injunction shall issue forthwith, enjoining Defendants from enforcing, applying, or attempting to apply those sections of the following laws which this Court declares are invalid: Executive Orders 89-17 and 89-25; DHEC Regulation 61-69 (January 12, 1990); H.3169 (R. 729) (June 13, 1990), adding S.C. Code Ann. § 44-56-59 and amending S.C. Code Ann. § 44-56-60; and Act No. 196 of 1989, §§ 5, and 9, amending S.C. Code Ann. §§ 44-56-205 and 44-56-130.

/s/ Matthew J. Perry
United States District Judge

[Filed Jan. 11, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:90-1402-0

HAZARDOUS WASTE TREATMENT COUNCIL,
On behalf of itself and its members,
Plaintiff,

-vs-

STATE OF SOUTH CAROLINA,
John T. Campbell,
Secretary of State,
Wade Hampton Building,
P.O. Box 11350,
Columbia, SC 29211,

-and-

CARROLL A. CAMPBELL, JR.,
Governor, in his official Capacity,
State House,
P.O. Box 11369,
Columbia, SC 29211,

-and-

COMMISSIONER South Carolina Department of
Health and Environmental Control,
in his official capacity,
2600 Bull Street,
Columbia, SC 29201,

-and-

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,
2600 Bull Street,
Columbia, SC 29201,
Defendants.

MEMORANDUM AND ORDER

The plaintiff Hazardous Waste Treatment Council, a corporate trade association with approximately seventy member firms providing licensed services of treatment, recycling and disposal of hazardous wastes, commenced this action against the defendants State of South Carolina, its Governor, The South Carolina Department of Health and Environmental Control (DHEC) its Commissioner and its Board for declaratory and injunctive relief, prohibiting implementation of certain restrictions which defendants have placed upon treatment and disposal, in South Carolina facilities, of hazardous wastes generated in other states. The matter is now before the Court pursuant to the plaintiff's motion for a preliminary injunction, barring enforcement of the restrictions.

In its complaint the plaintiff challenges South Carolina's announced purpose, set forth in its statutes, regulations and Executive Orders to (1) prohibit passage and disposition into South Carolina facilities, hazardous wastes generated in states which have not provided within their borders facilities for the disposal of hazardous wastes; (2) impose discriminatory quotas upon the quantities of such wastes otherwise permitted; and (3) create a mandatory preference for wastes generated in South Carolina. Specifically plaintiff contends that South Carolina's statutes, Executive Orders and regulations

(1) prohibit plaintiff's member companies located in South Carolina from accepting any hazardous wastes generated outside the State *unless* the state of origin reciprocates and is free of bans on permitting hazardous

waste treatment, storage and disposal within its borders—a blacklisting of generators from certain states, barring them from engaging in commerce within South Carolina;

(2) require plaintiff's member companies located in South Carolina to provide a "preference" in their operations for hazardous wastes within South Carolina over any such wastes generated outside this State—a preferred "right of access" which discriminates against generators from all other states;

(3) impose artificial, arbitrary and discriminatory quotes on the volume of hazardous wastes which may be disposed within this State by limiting disposal of wastes originating from other states;

(4) impose artificial and discriminatory requirements for the permitting of any new or expanded hazardous waste management facility proposed within South Carolina—requiring a "demonstration of in-state need" regarding hazardous waste treatment, storage and disposal in the permit applications from including projections of wastes generated from any other states as a basis for their statement of "need." Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, pp. 2, 3. Plaintiff contends that these laws (1) discriminate against the free flow of interstate commerce—a violation of the Commerce Clause (U.S. Const. Art. I, § 8 cl. 3); and (2) conflict with and are preempted by the federal hazardous waste management regulatory program —a violation of the Supremacy Clause (U.S. Const. Art. VI, cl. 2) and federal regulations prohibiting such laws (40 C.F.R. § 271.4).

Plaintiff asserts that on account of the challenged South Carolina laws, its members are unable to participate fully in the important business of national waste management that [sic] and they are losing business revenues for which they lack any remedy at law. Plaintiff argues also that because these laws are adverse to the public interest—

i.e. the free movement of hazardous wastes between all states for safe and effective treatment and disposal—this Court should issue a preliminary injunction.

Defendants deny that their statutory laws, executive orders and regulations violate the Constitution as alleged. Defendants assert that "[t]he South Carolina program represents a fully permissible response to the federal mandate; that the State has formulated its own Hazardous Waste Management Program which has been approved by the Environmental protection Agency (EPA); the State has submitted and gained federal approval of a Capacity Assurance Plan ("CAP") for managing hazardous wastes generated within the State over the next twenty years and thus has preserved its right to remedial-action Superfund monies supplied by EPA; and the State has entered into a regional agreement that coordinates and provides for the needs of both in-state and out-of-state generators of hazardous waste." DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, p. 3. Defendants also argue that, because federal law requires that South Carolina ensure that it can provide for the treatment and disposal of all hazardous wastes generated in the State in the next twenty years, South Carolina must consider separately—and fashion an allocation between both in-state and out-of-state generators—which has been expressly commanded and thus sanctioned by Congress and that, moreover, South Carolina's particular CAP (including provisions at issue here) has been approved by EPA. *Id.*

BACKGROUND

The national problem of hazardous waste management has been addressed through a comprehensive Federal regulatory program administered by the United States Environmental Protection Agency (EPA) in cooperation with the states. In addition to Resource Conservation and Recovery Act ("RCRA"), Congress has enacted the Com-

prehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") the "Superfund" statute.[1] While RCRA addressed the management aspects of solid wastes, CERCLA addresses primarily the clean-up of untreated hazardous waste disposal sites. In 1980, exercising its authority under these statutes, EPA issued extensive regulations regarding implementation of state hazardous waste management programs. Thereafter, as a part of this nationwide program, EPA delegated to South Carolina certain authority to regulate hazardous waste management within the state. *See* 50 Fed. Reg. 46437 (November 8, 1985).

Despite congressional efforts, many states ignored the CERCLA facility assurance requirement and refused to permit any new treatment, storage, and disposal facilities. In their brief (p. 5) the defendants state that although most states were in agreement that the hazardous waste problem was a threat to the entire nation, many states and localities succumbed to the "not in my backyard" ("NIMBY") syndrome with the resultant effect that most hazardous waste continued to be shipped to the scarce existing facilities in a few select states.

Congress responded with the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). SARA undertook to address the NIMBY problem by requiring states to provide additional assurance of adequate future capacity to treat and dispose of hazardous waste as a condition to the funding of Superfund site cleanups in the states. As added by SARA, section 104(c)(9) of CERCLA provides:

> (9) Sitting
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> Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the state in which the release occurs first enters into a contract or

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[1] 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986).

cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or, destroyed,

(B) Are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 *et seq.*].

42 U.S.C. § 9604(c)(9).

As previously noted, RCRA envisaged that administrative and enforcement activities would primarily be performed by the states. To meet this end, RCRA § 3006(b) provides that states may apply to EPA for authorization to implement a hazardous waste treatment program "in lieu of the Federal program." *See* 42 U.S.C. § 6926(b). EPA's regulations implementing the statutory requirements for authorization of state programs are set forth in 40 C.F.R. Part 271 (1989). Entitled "REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS," Part 271 "specifies the procedures EPA will follow in approving, revising, and withdrawing approval of State programs and the requirements State programs must meet to be approved by

the Administrator under section 3006(b) and (f) of RCRA." 40 C.F.R. § 271.1(a).

In essence, RCRA § 3006 provides that EPA must authorize a state program unless it is found to be less stringent than the federal program outlined in RCRA, inconsistent with RCRA provisions or regulations, or simply inadequate in terms of its enforcement provisions. In implementing Section 3006, EPA provided:

> § 271.4 Consistency.
>
> To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.
>
> (a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to another State for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.
>
> (b) Any aspect of State law or the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.
>
> (c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

40 C.F.R. § 271.4 (emphasis added. Part 271 also contains detailed provisions which specify the criteria and procedures for withdrawing approval of state programs,

including citizen petitions to EPA withdrawal and for participation on withdrawal proceedings. *See* 40 C.F.R. § 271.22 and § 271.23.

The National Problem of Hazardous Waste Management

Recognizing the need for a hazardous waste management program that is "national in scope and concern, Congress enacted the Resource Conservation and Recovery Act (RCRA in 1976. 42 U.S.C. § 6901(a)(4). This national program encourages states to cooperate with EPA and their sister states regarding the entire hazardous waste management field. While EPA retains authority to administer the national program, participating states may implement their own waste management programs so long as they are "equivalent" and "consistent" with EPA regulations. RCRA § 3006(b) 42 U.S.C. § 6926(b).

To determine whether an approved state hazardous waste management program is "consistent with" the Federal regulatory scheme, EPA issued regulations setting forth specific criteria. *See* 40 C.F.R. § 271. These regulations emphasize that "Congress intended (through enactment of RCRA,) for State programs receiving final (EPA) authorization to become fully part of an integrated national program to control hazardous waste." 45 Fed. Reg. 3393 (May 19, 1980). Critical to the success of this "national program" is that "the interstate commerce concerns involved here are emphasized by the establishment through RCRA of a national regulatory scheme, even though that scheme is not on its face preemptive (of State programs)." *Id.*

Consistent with the national approach to the hazardous waste management field, Congress enacted certain amendments to RCRA through passage of the Hazardous and Solid Waste Amendments ("HSWA") Pub. L. No. 98-516. These amendments emphasized further the scope of the national problem and the need to employ state-of-the-art hazardous waste management technology across the

country. Consequently, these amendments established national land disposal restrictions which require that hazardous wastes be treated by using the "best demonstrated available technology" before the waste can be land-disposed. *See* 42 U.S.C. § 6924(d)-(m).[2]

Hazardous Waste Management in South Carolina

There are three facilities located in South Carolina—all operated by plaintiff's members—licensed under federal and state law to treat, store or dispose of hazardous wastes. The largest facility, owned and operated by Laidlaw Environmental Services, Inc. (formerly GSX Chemical Services, Inc.) in Pinewood, South Carolina, consists primarily of secure, engineered landfill permitted by EPA on an interim basis in 1980 and fully permitted by both EPA and the South Carolina Department of Health and Environmental Control (DHEC) in 1989.[3] The two other facilities both operate waste incinerators. One (a rotary kiln incinerator) is owned by a Laidlaw subsidiary, Thermal Oxidation Corporation in Roebuck, South Carolina.[4] The other (an open hearth incinerator) is owned by T[h]ermalKEM, Inc., and is located in Rock Hill, South Carolina.[5]

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[2] Plaintiff argues that Congress enacted the HSWA land disposal amendments directly because plaintiff's members could provide the most advanced and effective waste management technologies and services.

[3] *See* Affidavit of Roger E. Davis at ¶¶ 5, & 7. Landfills such as Laidlaw's must be constructed with dual synthetic liners beneath the waste, leachate collection systems to remove liquids, leak detection systems, and a groundwater monitoring system. There are only a limited number of major commercial landfills authorized for hazardous waste disposal in the United States and, like Laidlaw, all serve customers on a national basis. Fortuna Affidavit at ¶. 7.

[4] Davis Affidavit at ¶ 4.

[5] Recognized by EPA as the "Best demonstrated achievable technology" for many hazardous wastes, incineration reduces the

From their inception, all three facilities have accepted hazardous Wastes generated from outside South Carolina. Because of the specialized skills and complex technology required to meet federal and state regulations, there are a limited number of commercial facilities in the country that can safely and effectively treat and dispose of hazardous wastes. Fortuna Affidavit at ¶ 7.

Therefore, these three South Carolina facilities have historically served out-of-state generators of hazardous wastes.[6] At the same time these facilities conduct a substantial volume of business with generators located within South Carolina. Zeigler Affidavit at ¶ 15. Davis Affidavit.

Additionally, many of plaintiff's members located outside South Carolina conduct business with facilities in South Carolina.[7] Some of these out-of-state facilities receive hazardous wastes generated by and shipped from South Carolina companies.[8] Plaintiff argues that the availability of an environmentally secure engineered, licensed disposal facility in South Carolina ensures that its out-of-state members—several of whom are engaged in Superfund cleanup activities—will dispose of their wastes in an environmentally safe manner and that any disruption in the availability or capacity of the three South Carolina facilities interferes significantly with the ability

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volume of waste by 70 percent, and is capable of treating 85 percent of the hazardous waste generated in the United States. Affidavit of William J. Ziegler at ¶¶ 6 and 9. A licensed incinerator must consistently destroy at least 99.99 percent of the principal hazardous constituents in the processed wastes. Ziegler Affidavit at ¶ 7; Fortuna Affidavit at ¶ 1.

[6] Affidavits of Jerry P. Deakle (at ¶ 3), Phil Fuller (at ¶ 3), James L. Chocklett (at ¶ 3), Tim Mitchell (at ¶ 3), and Samir Coluche (at ¶¶ 3 and 4).

[7] Mossholder Affidavit at ¶ 2; Robertson Affidavit at ¶ 2.

[8] *See* Robertson Affidavit at ¶ 4.

of plaintiff's out-of-state members to conduct their business.[9]

The Challenged South Carolina Laws, Executive Orders and Regulations

Beginning in 1988 South Carolina enacted the First of a series of laws restricting and prohibiting the importation of hazardous wastes generated in other states.

1. In 1988 DHEC began conditioning the issuance of permits for any new or expanded facility upon the needs of "in-state" generators. DHEC submitted permanent regulations containing this requirement to the South Carolina General Assembly in February 1989. The regulation (DHEC Reg. 61-99) was approved (through expiration of a statutory waiting period) on January 12, 1990.[10] Davis Affidavit at ¶ 25. The permit regulation requires an applicant to demonstrate "in-state need" for issuance of a permit regarding any new facility or expansion of an existing facility. Reg. 61-99. Before a permit may issue, an applicant must document:

(1) the remaining available capacity at other existing facilities within South Carolina;

(2) The current volume of wastes generated within the State which will require off site management and an annual projection of such volume for each of the next five years—the "in-state" need; and

(3) the existence of additional available capacity outside South Carolina which may serve to project in-state need.

DHEC Reg. 61-99 111(C).

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[9] Mossholder Affidavit at ¶¶ 3, 5; Robertson Affidavit at ¶¶ 3, 4.

[10] In the interim, DHEC promulgated several emergency measures to prevent issuance of any faciilty permit until the permament regulations were approved. *See* Ziegler Affidavit at ¶¶ 31-32.

The permit regulations mandate that "for purposes of demonstrating need, hazardous waste generated outside the State of South Carolina shall not be included." [11] DHEC Reg. 61-99 111 (C).

2. The Blacklisting Laws

On January 19, 1989 Governor Campbell issued Executive Order 89-03 which banned South Carolina from accepting any waste originating from certain states. Executive Order 89-03 provided that effective March 1, 1989:

> No person who owns or operates a disposal facility in this State shall accept a hazardous waste which is generated in another State and is banned or prohibited for disposal by any statute, regulation or administrative decision of the State.

Executive Order No. 89-03 at 4. The Executive Order was extended and amended by Executive Order 89-17 which was issued on April 3, 1989. In June 1989, by passage of Act No. 196 of 1989 the South Carolina General Assembly enacted it into law.[12]

South Carolina sent copies of its laws to the environmental quality directors of all its sister states and sought immediate certification that their state did not ban the

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[11] Plaintiff argues that as these regulations deny the relevance of national needs, and that they are interfering with the national program designed to safely and efficiently manage the ever growing national program.

[12] The statute provides:

> It is unlawful for any person who owns or operates a waste treatment facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment of hazardous waste.

S.C. Code Ann. § 44-56-130(4).

treatment of hazardous wastes within its borders. Davis Affidavit at ¶ 9. Thereafter, the first blacklist was published on March 3, 1989, listing nearly half the states in the nation. *See* DHEC, Status of Governor Campbell's Executive Order No. 89-03 (March 3, 1989).

Plaintiff argues that the blacklisting laws have caused its South Carolina members facilities to lose customers in states that are currently blacklisted.[13]

The Preference Requirement for South Carolina Generated Wastes

The same laws which blacklisted nonconforming states also establishes an additional obstacle to treatment and disposal of out-of-state generated wastes. Executive Order 89-03, its successor Executive Order 89-17 and Act No. 196 provided:

> All hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials at licensed facilities within the State.

The preference requirement has the express purpose of restricting the amount of out-of-state generated wastes that are treated and disposed of in South Carolina.

The Discriminatory Quotas of Out-of-State Wastes

On July 6, 1989 Governor Campbell issued Executive Order No. 89-25. Executive Order 89-25 allocates the portion of the overall statutory quota that may be applied to out-of-state generators

> Hazardous waste disposal facilities operating in South Carolina shall reserve 54,000 tons per year of the statutory maximum of 135,000 tons per year for South Carolina generated hazardous waste; pro-

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[13] Davis Affidavit at ¶¶ 17-18.

> vided further that of the remaining 81,000 tons, a hazardous waste disposal facility may not receive more than 10,000 tons from any state in any calendar quarter, not to exceed the annual cap of 35,000 tons.

Executive Order 89-25 also includes a clause which enable[s] a "sharing of excess in-state capacity" at the end of a calendar year.[14] However, this provision is also contingent upon a preference for South Carolina wastes:

> In reviewing such demonstrations (for available excess capacity) the Department is hereby directed to consider past utilization of the site and anticipated South Carolina needs, including but not limited to waste generated from state and Federal Superfund cleanup activities.

Executive Order No. 89-25 at 4.

On June 13, 1990 Governor Campbell signed into law H. 3169 (R. 729) amending the statutory quota, adding S.C. Code Ann. § 44-56-59 and amending S.C. Code Ann. § 44-56-60. This new amendment has the following effect:

> (1) it reduces the annual quota on all out-of-state generated waste from 135,000 to 120,000;
>
> (2) when combined with the capacity restrictions imposed by Executive Order 89-25, it reduces the annual portion allocated for out-of-state wastes to a maximum of 66,000 tons (55% of total capacity) this year and to 56,000 tons (51% of that capacity) in July 1991 when a 110,000 ton quota takes effect;

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[14] If after the third quarter of any calendar year, and upon demonstration to DHEC that the capacity reserved for South Carolina generators will not be required in the remainder of the year, the excess capacity may be offered to non South Carolina generators. Executive Order 89-25 at 4.

(3) it allows land disposal in excess of the annual 120,000 ton quota only if (a) the excess waste is from a South Carolina site or (b) at least 110,000 tons of South Carolina waste has been disposed of by land burial in this state during the year;

(4) it lowers the annual quota even further by limiting generators in each state to the disposal volume that all generators in their state shipped in the previous 12 months.

* * * * * *

Plaintiff argues that the net effect of these "protectionist" laws is that they are having the effect of interfering with the free flow of interstate commerce.

The Commerce Clause

The United States Constitution gives Congress the power to regulate commerce among the States.[15] Also, the Commerce Clause of the Constitution limits the authority of a state to discriminate against interstate commerce. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *H. P. Hood & Sons Inc. v. Dumond*, 336 U.S. 525, 534-35 (1949); *Welton v. Missouri*, 91 U.S. 275 (1876). This "negative aspect" of the Commerce Clause—limiting the power of the states to regulate interstate commerce—prohibits a state from placing its parochial interests above the national interest in the free flow of interstate commerce. *New Energy*, 486 U.S. at 273-74. Indeed, state laws that discriminate against interstate commerce are "routinely" struck down "unless the discrimination is demonstrably justified by valid factors unrelated to economic protectionism." *Id.* at 274 citing

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[15] United States Constitution, Art. 1 § 8, cl. 3:

The Congress shall have power—to regulate Commerce with foreign Nations, and amount the several States. . . .

Maine v. Taylor, 477 U.S. 131 (1986). The Supreme Court has explained the broad purpose of the Commerce Clause as follows:

> The principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. 511, 527, 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'[1]

H. P. Hood & Sons, Inc. v. Dumond, 336 U.S. 525, 537-538 (1949).

The Supreme Court is alert to the evils of "economic isolation" and protectionism but has recognized that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. For example, the Supreme Court has upheld a Maine statute that prohibited the importation of a certain type of baitfish not native to Maine because the baitfish contained a parasite that would have a serious detrimental effect on Maine's fisheries. *Maine v. Taylor*, 477 U.S. 131 (1986). Such state laws do not discriminate against interstate commerce; they "simply prevent traffic in noxious articles, whatever their origin." *Philadelphia v. New Jersey*, 437 U.S. 617 1978. But "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. State of New Jersey*, 437 U.S. 617, 624 (1978). *See H. P. Hood & Sons, Inc. v. Dumond, supra; Toomer v. Witsell*, 334 U.S. 385, 403-406 (1948). And the clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. *Welton v. Missouri*, 91 U.S. 275 (1876).

Of binding precedential value in this case is the Supreme Court's decision striking down, on Commerce Clause grounds, New Jersey's efforts to construct a barrier to the shipment of wastes for treatment and disposal in that state. Exasperated over the mounting problems of out-of-state wastes, New Jersey enacted a statute which provided that "no person shall bring into this State solid or liquid waste which originated or was collected outside the territorial limits of the State. . . . *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The Court stated that

> [I]t does not matter whether the ultimate aim of (New Jersey's protectionist law) is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may be incidentally affected. But whether New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin to treat them differently. . . .

Id. at 626-627. *See also National Solid Wastes Management Association, et al v. The Alabama Department of Environmental Management, et al.* 910 F.2d 713 (11th Cir. 1990) which declared unconstitutional an Alabama law prohibiting that state's commercial waste management facilities from accepting hazardous wastes generated in other states unless the other states met certain requirements.

The defendants argue that the challenged hazardous waste laws, Executive Orders and regulations do not conflict with the Commerce Clause of the Constitution

because South Carolina's hazardous waste management program has been approved by EPA under RCRA, CERCLA and SARA; that when Congress enacted RCRA it stated its intent that each state be permitted to implement its own hazardous waste program. RCRA § 3006(b), 42 U.S.C. § 6926(b).

Defendants point to a provision preserving state authority over regulation of hazardous waste which provides that

> Upon the effective date of regluations under this subchapter no state or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations. . . . Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

RCRA § 3009, 42 U.S.C. § 6929.

Defendants cite *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System,* 472 U.S. 159, 174 (1985) where the Court addressed the constitutionality of certain state laws concerning interstate bank acquisitions. Under the Bank Holding Company Act of 1956, 12 U.S.C. § 1841, *et seq.*, before a bank holding company could acquire a bank, it has to obtain the approval of the Federal Reserve Board (FRB). An amendment to the Bank Holding Company Act (the Douglas Amendment) prohibited the FRB from approving an interstate acquisition unless the acquisition was "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d). In the early 1980's several New England states enacted statutes lifting the Douglas Amendment ban, but only on a reciprocal basis within the geographic region. The state laws were chal-

lenged on Commerce Clause and other constitutional grounds. The Court found the state laws to be within the kind contemplated by the Douglas Amendment and constitutional. The Court stated that

> There can be little dispute that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking, banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject. *Lewis v. B. T. Investment Managers, Inc.*, 447 U.S. 27 (1980). Nor can there be serious question that an individual State acting entirely on its own authority would run afoul of the dormant Commerce Clause if it sought to comprehensively regulate acquisitions of local banks by out of state holding companies. *Sparhase v. Nebraska, ex rel Douglas*, 458 U.S. 941 (1982). But that is not our case. Here the commerce power of Congress is not dormant, but has been exercised by that body when it enacted the Bank Holding Company Act and the Douglas Amendment to the Act. Congress has authorized by the later amendment the Massachusetts and Connecticut statutes which petitioners challenge as violation of the Commerce Clause. When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.

Northeast Bankcorp, Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. at 174. The defendants argue that the South Carolina hazardous waste provisions fall within the realm "plainly authorized" by Congress and must be measured accordingly. So viewed, the defendants argue, the South Carolina hazardous waste provisions are invulnerable to constitutional attack.

While Congress can authorize States to erect barriers to interstate commerce, such congressional authorization must be "expressly stated" and "unmistakably clear."

"Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983). Indeed, "Congress may redefine the distribution of power over interstate commerce in a manner which would otherwise not be permissible." *South-Central Timber Devel, Inc. v. Wunnicke*, 467 U.S. 82, 87-88 (1984). But such congressional intent or authorization for states to affect interstate commerce, however, must be "expressly stated" and unmistakably clear." *Id.* at 91.

But nothing is contained in either statute, RCRA, CERCLA or SARA that has "expressly stated" in "unmistakably clear" language congressional authorization for South Carolina to take action in the mangement of its hazardous waste program that adversely effects interstate commerce. *See National Solid Waste Management Association, et al. v. Alabama Department of Environmental Management*, 910 F. 2d 713 (11th Cir. 1990).

The Standard for Interlocutory Injunctive Relief

In this Circuit, a Court's determination of whether to grant or withhold interim injunctive relief is governed by four preliminary determinations:

(1) the plaintiff's likelihood of success on the merits of the underlying dispute; (2) whether the plaintiff will suffer irreparable harm if interim relief is denied; (3) the harm to the defendant if an injunction is issued; and (4) the public interest. *Quince Orchard Valley Citizens Association, Inc., et al v. Hodel, et al.*, 872 F. 2d 75 (4th Cir. 1989); *North Carolina State Ports Authority v. Dart Containerline Co. Ltd.*, 952 F. 2d 749 (4th Cir. 1979). The trial court must weigh each of these factors in light of the " 'flexible interplay' among all the factors considered." *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel, supra* at 79, *citing Blackwelder Furn. v. Seilig*

Mfg. Co., 550 F. 2d 189, 196 (4th Cir. 1977). If the likelihood of success on the merits is great, the need for showing the probability of irreparable harm is less. Conversely, if the likelihood of success is remote, there must be a strong showing of the probability of irreparable injury to justify the issuance of the injunction." *Id.* at 79; *State Ports Authority*, 592 F. 2d at 750. "Finally, the court must balance the potential harm to the plaintiff, if relief is denied, against the potential harm to the defendant if an injunction issues. In striking this balance, a trial court must be mindful of the effect of the decision, if any, on broader concerns of public interest. *Quince Orchard Valley Citizen Ass'n v. Hodel*, 872 F. 2d at 79.

1. In this case, the plaintiff's likelihood of success on the merits is apparent. For more than two hundred years the Commerce Clause (U.S. Const. Art. VI, cl. 2) has ensured that the States, in dealing with each other as well as with the Federal government (1) will not engage in "economic protectionism" to the disadvantage of the free flow of interstate commerce, and (2) will not engage in activities conflicting with federal laws and policies. Each of the statutes, Executive Orders and regulations challenged by the plaintiff in this case will, if enforced by the defendants, interfere with interstate commerce. Plaintiff will likely succeed on the merits in their challenge to these actions under the Commerce Clause.[35]

2. The statutes, Executive Orders and regulations which plaintiff challenge are causing injury to the plaintiff's members. The effect of the challenged laws on plaintiff's three member facilities located within South Carolina is manifested by the loss of revenues; by the manner in which they are restricted and limited in the total amount of wastes they may receive from particular states and by

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[35] While it is apparent that plaintiff will prevail on the merits in its challenges under the Supremacy Clause, that determination is not reached in this opinion. Instead, it will be treated, if necessary, in the final order.

the requirement that they choose from among their customers who happen to be from the same state. Customers or potential customers of plaintiff's members who happen to be located within "blacklisted" states are barred from doing business with them. The "preference" requirements require plaintiff's South Carolina members' facilities to turn away long standing customers who are located outside South Carolina. The "in state need" requirement contained in the permit regulations also have injured the business interests of plaintiff's South Carolina members.

Plaintiff's members located outside South Carolina are also suffering harm. Members residing in a blacklisted state are barred from sending shipments to facilities located in South Carolina and must find alternative treatment facilities if possible.[16] Plaintiff's members residing outside South Carolina are subject to the second class status—and the increased cost and inconvenience—imposed by the challenged "preference" laws especially those combined with the discriminatory quotas. Mossholder Affidavit at ¶ 7; Robertson Affidavit at ¶ 6.

3. It cannot be disputed that South Carolina has an interest indeed in overriding duty to protect human health and the environment. It is equally clear that each of the laws here challenged, seeks to achieve that goal. But here the plaintiff challenges only those portions of the challenged laws whose purpose is to discriminate against out of state hazardous wastes based solely on their place of origin. Hazardous wastes generated out of state pose no more threat to human health and the environment than hazardous wastes generated in South Carolina. *See Philadelphia v. New Jersey*, 437 U.S. at 629.

4. Finally, the public interest is best served by the grant of preliminary injunction relief. Significantly, plain-

[16] *See* Cocklett Affidavit at ¶ 6; Culler Affidavit at ¶ 6; Colouche Affidavit at ¶ 7; Deakle Affidavit at ¶ 7; Mitchell Affidavit at ¶ 7.

tiff's members are in the business of complying with the comprehensive regulatory scheme and developing and utilizing safe and efficient treatment and disposal systems for hazardous wastes. Thus, human health and the environment will not be adversely affected by the issuance of injunctive relief.

It may not be gainsaid that the public interest is best served when unconstitutional laws are enjoined.

South Carolina has, by the challenged statutes, Executive Orders and regulations, erected an unlawful economic barrier at its border. Notwithstanding the stated purpose expressed in these laws, to limit within its borders the treatment and disposal of wastes generated from other states—while not imposing similar prohibitions on wastes generated within South Carolina—it cannot isolate itself from the flow of commerce by erecting discriminatory barriers.

CONCLUSION

Upon consideration of pleadings, the affidavits, the memoranda and arguments of counsel, and for the reasons above stated, the plaintiff's motion for a preliminary injunction is hereby granted.

IT IS SO ORDERED.

/s/ Matthew J. Perry
MATTHEW J. PERRY
United States District Judge

Columbia, South Carolina,
January 11, 1991.

APPENDIX E

Resource Conservation and Recovery Act of 1976, as amended, § 3006

42 U.S.C. § 6926. Authorized State hazardous waste programs

(a) Federal guidelines

Not later than eighteen months after October 21, 1976, the Administrator, after consultation with State authorities, shall promulgate guidelines to assist States in the development of State hazardous waste programs.

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that

(1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

(c) Interim authorization

(1) Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under sections 6922, 6923, 6924, and 6925 of this title, may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subchapter. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subchapter, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subchapter for a period ending no later than January 31, 1986.

(2) The Administrator shall, by rule, establish a date for the expiration of interim authorization under this subsection.

(3) Pending interim or final authorization of a State program for any State which reflects the amendments made by the Hazardous and Solid Waste Amendments of 1984, the State may enter into an agreement with the Administrator under which the State may assist in the administration of the requirements and prohibitions which take effect pursuant to such Amendments.

(4) In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

(d) Effect of State permit

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

APPENDIX F

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, § 104(c)(9)

42 U.S.C. § 9604(c)

(9) Siting

Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.]

APPENDIX G

40 C.F.R. § 271.4

§ 271.4 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

APPENDIX H

50 Federal Register 46,437

(Nov. 8, 1985)

40 CFR Part 271

[OSW-FRL-2921-6]

South Carolina; Decision on Final Authorization of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Determination on South Carolina's Application for Final Authorization.

SUMMARY: South Carolina has applied for Final Authorization under the Resource Conservation and Recovery Act (RCRA). EPA has reviewed South Carolina's application and has reached a final determination that South Carolina's Hazardous Waste Program satisfies all of the requirements necessary for Final Authorization. Thus, EPA is granting Final Authorization to the State to operate its program in lieu of the Federal program.

EFFECTIVE DATE: Final Authorization for South Carolina, for purposes of judicial review, shall be effective at 1:00 p.m. Eastern time, on November 22, 1985. However, in accordance with § 271.20(e), this Notice constitutes the Agency's official decision to approve South Carolina for Final Authorization.

FOR FURTHER INFORMATION CONTACT: Otis Johnson Jr., Chief, Waste Planning Section, Residuals Management Branch, Waste Management Division, U.S. Environmental Protection Agency, 345 Courtland Street, N.E., Atlanta, Georgia 30365, (404) 257-3016.

SUPPLEMENTARY INFORMATION:

I. Background

Section 3006 of the Resource Conservation and Recovery Act (RCRA) allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in the State in lieu of the Federal program. To qualify for Final Authorization, a State's program must: (1) Be "equivalent" to the Federal program, (2) be consistent with the Federal program and other State programs, and (3) provide for adequate enforcement (Section 3006(b) of RCRA, 42 U.S.C. 6226 (b)). On July 23, 1984, South Carolina submitted a complete application to obtain Final Authorization to administer a RCRA program. On October 25, 1984, EPA published a tentative decision announcing its intent to grant South Carolina Final Authorization. Further background on the tentative decision appears at 49 FR 42959, October 25, 1984.

In the October 25 notice announcing the Agency's tentative determination, EPA announced the availability of the State's application for public review and comment and the date of a public hearing on the application. The public hearing was not held, since neither EPA nor the South Carolina Department of Health and Environmental Control received a significant show of interest in holding the hearing.

On March 5, 1985, the decision to grant final authorization to South Carolina was temporarily postponed. At that time, EPA decided to defer a final decision until July 1985 to allow the State a reasonable period of time to resolve identified issues.

Prior to EPA's review of the State's performance in July 1985, the South Carolina Hazardous Waste Management Act (1935 Act. No. 436) was amended to establish increased fees for disposal of hazardous waste. The amendments passed in June 1985 changed section 44-56-

170 to raise the fee for land disposal of wastes generated within the State from $5.00 to $13.00 per ton. For land disposal of wastes generated outside the State, the fee was raised from $7.50 per ton to either $18.00 per ton or to the amount that would be charged for land disposal by the State in which the wastes were generated, whichever is higher.

EPA determined that this statutory change constituted a substantial program revision, and in accordance with 40 CFR 271.20(b), the Agency decided to solicit public comment. On September 13, 1985 (50 FR 37385), EPA published a second notice of tentative determination to approve the State. In that notice, EPA highlighted the question of whether the South Carolina Hazardous Waste Management Act Amendments rendered the State program inconsistent with the Federal program or approved State programs under RCRA.

The question to be settled before EPA granted final authorization was whether the South Carolina fee schedule rendered the State program inconsistent with the Federal program and other State programs. Under § 271.4(a) a State treatment, storage or disposal at facilities authorized to operate under the Federal or an approved State program . . .". [sic]

In the notice of tentative determination, EPA stated that while higher fees for out-of-State wastes should not be encouraged, the Agency did not have any evidence to indicate that the new fees would unreasonably restrict, impede, or operate as a ban on the transportation of hazardous waste into the State. The only evidence before the Agency at that time were South Carolina's statements that the fee imposed constitutes a "relatively small percentage" of the actual cost of disposal and that, in the State's view, it would not unreasonably restrict or impede the movement of hazardous waste (50 FR 37386, September 13, 1985). The Agency solicited comment on whether the State law unreasonably restricts, impedes or operates as a ban on

the importation of hazardous waste, under the consistency requirements of 40 CFR 271.4(a). EPA received written comments and also held a public hearing in Columbia, South Carolina.

II. Basis for EPA's Decision to Grant Final Authorization

The Agency today is making a final determination that the South Carolina fee schedule does not impose an unreasonable impediment or restriction or operate as a ban on the free movement of hazardous waste under 40 CFR 271.4. The fee schedule is not inconsistent with the Federal program or approved State programs under this regulation or under RCRA. This section explains the reasons for the Agency's decision on this matter. Because this was the only outstanding issue, the Agency is now able to grant final authorization to the State.

A. EPA's regulation

EPA adopted the present regulation at 40 CFR 271.4 (a) on May 19, 1980 (see 45 FR 33935, 33465-66, May 19, 1980). The regulation states that any aspect which "unreasonably restricts, impedes or operates as a ban" is deemed inconsistent.

In the preamble discussing § 271.4(a), EPA explains the regulation as follows. The Agency stated that any aspect of the program which operates as a ban on the interstate movemnent of hazardous waste is automatically inconsistent. The Agency noted that this position was supported by a court decision, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which held unconstitutional a statute banning transportation of certain wastes into the State for disposal because it violated the commerce clause of the Constitution. (This discussion is consistent with that in the preamble to the proposed regulation (44 FR 34259, June 14, 1979).)

EPA did not discuss what criteria it would apply in determining whether State programs unreasonably restrict or impede the free movement of hazardous waste. However, it is clear from the regulation that EPA intended "unreasonable restrictions or impediments" to render State programs inconsistent. The question of whether a State provision unreasonably restricts or impedes the free movement of hazardous waste did not arise in any final decision to grant RCRA final authorization until South Carolina's amended statute raised this issue.

B. The Agency's Tentative Decision on South Carolina Authorization

As noted above, EPA tentatively concluded that the South Carolina statute did not render the State program inconsistent under 40 CFR 271.4(a). In reaching this conclusion, the Agency considered all available facts. It appeared reasonably clear from the face of the statute that the fee schedule was not a ban and that it did not operate as a ban. The evidence before the Agency did not indicate that the fee schedule had significantly affected the flow of hazardous waste into the State. However, because the amended statute was a potentially significant change to the State program which might affect authorization under 40 CFR 271.4, the Agency solicited comment on whether the fee schedule unreasonably restricts or impedes the flow of hazardous waste into South Carolina.

C. Public Comment

Public comment, with one exception, supported EPA authorization of the State program. Several commenters did not address the question of the fee schedules but generally stated that South Carolina's RCRA program was supported by adequate legal authority and staffing and therefore deserved authorization. The only land disposal facility in South Carolina known to the Agency to accept

out-of-State hazardous waste and to pay the fees at issue also generally supported authorization, but did not address the question raised by the fee schedule.

Several other commenters who favored authorization argued that the fee schedule was reasonable and justified. They provided a variety of rationales including that the higher fees were appropriate: (1) To discourage land disposal as it is environmentally the least desirable form of disposal, (2) to raise money that might be expended to address released from land disposal units, (3) to discourage land disposal and thereby conserve the State's limited land disposal resources, and (4) to supplement State funds for monitoring compliance at land disposal facilities accepting out-of-State wastes.

The State of South Carolina commented that the one land disposal facility in South Carolina which accepts out-of-State wastes charges $90.00 per ton for disposal. First, the State noted that the new fee differential of $5.00 per ton for out-of-State wastes represents but a small percentage of this charge. The State believed that this small amount would not discourage out-of-State generators from using the facility. Second, the State noted that during the period of July to September of 1984 there were 16,848 tons of out-of-State waste disposed at the facility. During the same period in 1985, when the new fee schedule was in place, there were 26,352 tons of out-of-State waste disposed. The State cited this increase as factual proof that the fee schedule has not had any adverse impact on the amount of waste imported into the State. The State reported that fees had been collected at both the $18.00 rate and at higher rates corresponding to the fees of the States from which the wastes were shipped. Third, the State noted that a fee differential, including rates equivalent to those charged in the shipping State, had existed for several years and that there has been a continuing increase in the volume of wastes imported into the State.

The Hazardous Waste Treatment Council was alone in opposing authorization for South Carolina. The Council did not dispute that the volume of imported waste had increased despite the higher fees. Rather, they believed that the fee schedule discriminates on its face against interstate commerce and therefore was an unconstitutional and unreasonable restriction on the free flow of waste. The Council argued that: (1) the disparity in fees rendered the program "inconsistent" under RCRA 3006(b) as it did not promote the essential uniformity among hazardous waste programs intended by Congress, (2) the disparity in favor of in-State wastes was unconstitutional and therefore was inconsistent under RCRA 3006(b) and an unreasonable restriction or impediment under § 271.4(a), and (3) discriminatory statutes will frustrate RCRA objectives for a national market for development of proper treatment and disposal practices.

The Council stated that in promulgating 40 CFR 271.4, EPA had adopted a constitutional test to determine what is an unreasonable restriction and impediment. Therefore, they argued that the unconstitutional statute violated § 271.4(a). They also argued that it would be too difficult to assess whether there is in fact a significant discrimination on a case-by-case basis.

EPA believes that these are the substantive comments relating to the fee schedule and the Agency's decision. These and other comments are addressed in this notice and in a separate comment and response document that is available from EPA Region IV (address listed at the front of this notice).

D. Application of §271.4(a) to South Carolina's Fee Schedule

EPA carefully evaluated the above comments in determining whether the South Carolina fee schedule was an unreasonable restriction or impediment to the free movement of hazardous waste.

The Agency has determined that in applying § 271.4(a) to State laws and regulations, EPA should look to whether the State provision in fact has or is likely to have a significant adverse effect on the follow of hazardous waste into or out of the State. Thus, the unreasonableness of the restriction or impediment under § 271.4(a) should be measured by the impact of likely impact on the actual flow of waste. In applying this test, EPA will look to all relevant factors. The Agency will primarily focus on any available evidence on the quantities of wastes that are imported and exported.

The Agency believes that this test is a reasonable interpretation of its regulation and does not conflict with section 3006 of RCRA. Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable. Reasonable restrictions or impediments can logically include those that do not significantly decrease the flow of hazardous waste. Therefore, EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. Contrary to the statement by the Hazardous Waste Treatment Council, the preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impermissible restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.

EPA also believes that its interpretation of the regulation accords with RCRA. RCRA section 2006 requires EPA to approve State programs unless it finds they are; (1) Not equivalent, (2) not consistent, or (3) lacking adequate enforcement authority. To be equivalent, States must adopt a set of basic statutes and regulations that are equivalent to EPA's. In addition, States may adopt requirements which are more stringent or different than

EPA's authority. More stringent requirements are expressly permitted by RCRA section 3009. These requirements may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. Authorized States have adopted many State requirements that are unlike the requirements of other States and which, in some cases, have an effect on the flow of wastes. The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se*. Congress expected that States would not have identical programs and recognized the importance of allowing States to experiment with different requirements. Congress gave EPA the authority to interpret the term "consistent"; the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. Nothing in RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the Constitutional test as the test for consistency or unreasonable restrictions or impediments.

The Agency does not believe that higher fees for out-of-State wastes or other discriminatory practices should be encouraged. EPA is concerned that such fees may discourage wastes from going to the most appropriate facility for treatment or disposal.

However, it appears that South Carolina's fee schedule does not have a significant adverse effect on the flow of hazardous waste into or out of the State. All available evidence supports this conclusion. The fact that the fee differential is small in most cases indicates that the out-of-State fee probably will not restrict a significant volume of waste. Moreover, the fact that the volume of out-of-State wastes increased significantly after the higher fees were imposed suggests that there is not a significant adverse impact on the flow of wastes. The fees clearly do not operate as a ban in this case. In addition, some fees

were collected at the higher rate based on the fees of other States. Finally, the volume of wastes imported into the State has increased over the years despite a fee differential which included fees based on those in the State of origin. Although it is unknown how much more waste might have entered South Carolina if there were no fee differential, there is no information to suggests that a significant volume might be affected. The Agency disagrees that this test (which looks to the facts of each case) is too difficult to apply.

Several comments related to the reasons for the State's adoption of the fee schedule and one addressed the concern that discriminatory practices would frustrate RCRA objectives for a national market for proper treatment and disposal practices. EPA acknowledges that the State offered several reasons for the fee differential. However, the Agency believes that the reasons for the adoption of the fee or any purported benefits are not generally relevant to the question of reasonableness of the impediment or restriction. If a provision has little or no impact on the flow of wastes, EPA does not believe that the actual motives or benefits resulting from the provision should preclude authorization. EPA is also concerned that different provisions for in-State and out-of-State wastes may frustrate the best possible treatment and disposal of wastes. As noted above, RCRA intended that State programs be generally uniform for purposes of encouraging proper treatment and disposal and EPA has interpreted this consistency requirement to deny authorization where restrictions or impediments are unreasonable. It does not require EPA to deny authorization merely because in-State and out-of-State wastes are regulated somewhat differently by the State. In any event, there is no evidence that proper treatment or disposal is adversely affected by this statute; the volume of wastes into South Carolina has increased.

In applying this facts and circumstances test, EPA is aware that circumstances may change over time. The

Agency will therefore periodically reassess provisions which may unreasonably impede the flow of wastes, including this fee schedule of South Carolina. In addition, any provisions adopted by States seeking authorization and which impose or result in restrictions or impediments on the flow of wastes will be subjected to careful scrutiny. If an authorized State adopts restrictions or impediments that may affect the flow of hazardous wastes, EPA may find that such changes are significant revisions to the State's program and provide public notice and comment under § 271.21 on their potential impacts on interstate transportation of wastes. If the restrictions or impediments are found to be unreasonable, they would be grounds for withdrawal of the authorized program under § 271.22.

For the reasons discussed above, EPA has concluded that South Carolina's fee schedule is not an unreasonable impediment or restriction on the flow of waste into the State and that authorization is not precluded by § 271.4(a). Nevertheless, the Commissioner of the South Carolina Department of Health and Environmental Control has informed the Agency that he will recommend to the South Carolina Legislature that it repeal that aspect of the fee schedule which imposes higher fees based on rates charged by the State of origin. EPA supports this effort.

South Carolina is not authorized by the Federal government to operate the RCRA program on Indian lands and this authority will remain with EPA.

Final authorization is hereby granted to South Carolina to operate its hazardous waste management program in lieu of the Federal program subject to the limitation on its authority by the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98-616, November 8, 1984). South Carolina now has the responsibility for permitting treatment, storage, and disposal facilities within its bor-

ders and carrying out the other aspects of the RCRA program. South Carolina also has primary enforcement authority, although EPA retains the right to conduct inspections and make information requests under section 3007 of RCRA and to take enforcement action under sections 3008, 3013, and 7003 of RCRA.

Prior to the Hazardous and Solid Waste Amendments (HSWA) amending RCRA, a State with final authorization administered its hazardous waste program entirely in lieu of EPA. EPA's regulations no longer applied in the authorized State, and EPA could not issue permits for any facilities the State was authorized to permit.

Now, however, under section 3006(g) of RCRA, 42 U.S.C. 6226(g), the new Federal requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time as they take effect in non-authorized States. EPA is directed to carry out those requirements and prohibitions, including the issuance of full or partial permits, in authorized States until the State is granted authorization to do so.

As a result of HSWA, there will be a dual State-Federal regulatory program in South Carolina. To the extent the authorized State program is unaffected by the HSWA, the State program will operate in lieu of the Federal program. EPA will administer and enforce the portions of the HSWA in South Carolina until the State receives authorization to do so. Among other things, this will entail the issuance of Federal RCRA permits for those areas in which the State is not yet authorized. Once the State is authorized to implement a HSWA requirement or prohibition, the State program in that area will operate in lieu of the Federal program. Until that time the State will assist EPA's implementation of the HSWA under a Cooperative Agreement.

Federal HSWA requirements that are more stringent than the State's program apply in South Carolina. Any State requirement that is more stringent than a Federal

HSWA provision also remains in effect. (South Carolina is not being authorized now for any requirement implementing the HSWA.)

EPA has published a Federal Register notice that explains in detail the HSWA and its effect on authorized States. Refer to 50 FR 2872-28755, July 15, 1985.

Compliance With Executive Order 12291

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of entities. This authorization effectively suspends the applicability of certain Federal regulations in favor of South Carolina's program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burdens on small entities. This rule, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 271

Hazardous waste, Indian lands, Reporting and recordkeeping requirements, Waste treatment and disposal, Intergovernmental relations, Penalties, Confidential business information.

Authority: This notice is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b), and EPA Delegation 8-7.

Dated: November 5, 1985.

Jack E. Ravan,
Regional Administrator.

APPENDIX I

[EPA Logo]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

[Dec. 23, 1988]

The Administrator

MEMORANDUM

SUBJECT: Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues

To: Regional Administrators

In recent months we have focused on two parallel, but overlapping, issues in the hazardous waste management area. One issue has been the development of guidance for the State hazardous waste capacity assurance process called for by Section 104(c)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The other has been the issue of EPA's approach to State actions which may be inconsistent with the federal Resource Conservation and Recovery Act program.

This past June a task force on these RCRA consistency and CERCLA capacity issues presented their findings to me. In addition, we have now completed our guidance to the States for the CERCLA capacity assurance process. Based on an evaluation of the findings and guidance, I now want to present to you EPA's policy in the area of RCRA consistency and CERCLA capacity assurance.

First, we will rely on the CERCLA process as our primary vehicle for ensuring that States have adequate capacity to manage their hazardous wastes. As our CERCLA capacity guidance indicates, the States must provide EPA with a good knowledge of their current and

projected waste amounts and management practices, including correlation of imports and exports between States; description of waste minimization programs; and discussions of laws and regulations which may affect the state's ability to manage waste. EPA must approve these State assurances in order for EPA to provide Superfund remedial actions in a State after October 17, 1989.

Secondly, the Regions should use the procedures for withdrawal of authorized State RCRA programs in the case of failure to use the RCRA uniform manifest system, or for unreasonable restrictions on interstate waste movements. The CERCLA capacity assurance process should be used as an initial response to State actions which prohibit waste management within State boundaries without environmental justification. States may be able to resolve issues related to such actions themselves during the interstate discusssions that the CERCLA process will foster. The Regions should, therefore, decide whether to initiate proceedings to withdraw State RCRA programs for prohibitory actions after determining that the CERCLA process has proven ineffective.

I believe the above dual approach to be a positive one allowing us to work within the legal authority provided, and to assist States in developing needed waste management capacity.

/s/ Lee M. Thomas
LEE M. THOMAS

APPENDIX J

STATUTES, REGULATION AND EXECUTIVE ORDERS INVOLVED

STATUTES

(R299. H3326)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTIONS 44-56-35, 44-56-165, AND 44-56-205 SO AS TO AUTHORIZE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO PROMULGATE REGULATIONS ESTABLISHING STANDARDS FOR THE LOCATION OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES TO ENSURE LONG-TERM PROTECTION OF HUMAN HEALTH AND THE ENVIRONMENT, AND REQUIRE THAT ALL HAZARDOUS WASTE TREATMENT AND DISPOSAL FACILITIES IN THIS STATE SHALL GIVE PREFERENCE TO HAZARDOUS WASTE GENERATORS WITHIN THE STATE FOR TREATMENT AND DISPOSAL OF HAZARDOUS MATERIALS AT LICENSED FACILITIES IN THE STATE, TO DESIGNATE THAT A PORTION OF THE FEE IMPOSED UNDER SECTION 44-56-170(C) BE USED TO FUND HAZARDOUS WASTE REDUCTION AND MINIMIZATION ACTIONS OF THE DEPARTMENT AND TO ENFORCE BANS PROVIDED FOR IN SECTION 44-56-136(4), (5), AND (6): TO AMEND CHAPTER 56 OF TITLE 44 BY ADDING ARTICLE 2 SO AS TO PROVIDE THAT THE ENTITY PROVIDING FINANCIAL ASSISTANCE FOR A HAZARDOUS WASTE TREATMENT OR DISPOSAL FACILITY OR SITE MUST, UPON WRITTEN REQUEST OF THE DEPARTMENT, FURNISH THE DEPARTMENT INFORMA-

TION CONCERNING ITS FINANCIAL INTEGRITY, TO PROVIDE THAT THE DEPARTMENT MAY REQUIRE CERTAIN INFORMATION, TO AUTHORIZE THE DEPARTMENT TO REVIEW THE NATURE, EXTENT, AND SUFFICIENCY OF THE INFORMATION SUPPLIED, TO AUTHORIZE THE DEPARTMENT TO VERIFY THE INFORMATION WHICH IS FURNISHED; TO AMEND CHAPTER 56 OF TITLE 44 BY ADDING ARTICLE 9 SO AS TO CREATE THE HAZARDOUS WASTE MANAGEMENT RESEARCH FUND, TO PROVIDE THE PURPOSES OF THE FUND, TO SPECIFY THE PURPOSES FOR WHICH MONIES FROM THE FUND MAY BE EXPENDED. REQUIRE CERTAIN FEES TO BE REMITTED FOR CREDIT TO THE FUND: AUTHORIZE THE SOUTH CAROLINA UNIVERSITIES RESEARCH AND EDUCATION FOUNDATION TO EXPEND MONIES FROM THE FUND, REQUIRE ACCOUNTING OF MONIES SPENT BY THE FOUNDATION, TO CREATE A HAZARDOUS WASTE MANAGEMENT SELECT OVERSIGHT COMMITTEE, TO PROVIDE FOR ITS PURPOSES, RESPONSIBILITIES, AND MEMBERSHIP: TO AMEND SECTION 44-56-60. RELATING TO THE REQUIREMENTS FOR THE ISSUANCE OF A PERMIT FOR THE OPERATION, CONSTRUCTION, OR ALTERATION OF A HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITY, SO AS TO REQUIRE EVIDENCE OF FINANCIAL ASSURANCE AS THE DEPARTMENT DETERMINES PRIOR TO THE ISSUANCE OF A PERMIT: TO AMEND SECTION 44-56-130, RELATING TO UNLAWFUL ACTS REGARDING HAZARDOUS WASTE, SO AS TO PROHIBIT THE TREATMENT, STORAGE, OR DISPOSAL OF HAZARDOUS WASTE IN THIS STATE GENERATED IN ANOTHER STATE WHICH PROHIBITS THE TREATMENT, STORAGE, OR DISPOSAL OF THAT SUBSTANCE WITHIN ITS OWN

BORDERS: TO AMEND SECTION 44-56-160, AS AMENDED, RELATING TO THE HAZARDOUS WASTE CONTINGENCY FUND, SO AS TO MAKE CORRECTIONS IN REFERENCES TO FEES LEVIED PURSUANT TO OTHER CODE SECTIONS: AND TO AMEND SECTION 44-56-170, RELATING TO HAZARDOUS WASTE CONTINGENCY FUND REPORTS, FEES, AND ADMINISTRATION OF THE HAZARDOUS WASTE CONTINGENCY FUND, SO AS TO INCREASE THE FEE IMPOSED ON HAZARDOUS WASTES GENERATED IN AND OUT OF THIS STATE.

Be it enacted by the General Assembly of the State of South Carolina:

* * * *

SECTION 6. Chapter 66 of Title 44 of the 1976 Code is amended by adding:

"Section 44-66-205. All hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials at licensed facilities in the State."

* * * *

SECTION 9. Section 44-66-130 of the 1976 Code is amended by adding:

"(4) It is unlawful for any person who owns or operates a waste treatment facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act. Written documentation demonstrating compliance with this item must be submitted to the department before the transportation of any hazardous waste into the State for treatment.

(5) It is unlawful for any person who owns or operates a waste storage facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the storage of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe storage of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act. Written documentation demonstrating compliance with this item must be submitted to the department before the transportation of any hazardous waste into the State for storage.

(6) It is unlawful for any person who owns or operates a waste disposal facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the disposal of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe disposal of hazardous waste pursuant to the federal Comprehensive Environmental Response, Compensation and Liability Act. Written documentation demonstrating compliance with this item must be submitted to the department before the transportation of any hazardous waste into the State for disposal."

* * * *

In the Senate House the 14th day of June
In the Year of Our Lord One Thousand Nine Hundred and Eighty-Nine.

Nick A. Theodore,
President of the Senate

Robert J. Sheheen,
Speaker of the House of Representatives

Approved the 20th day of June, 1989.

Carroll A. Campbell, Jr.,
Governor

(R729, H3169)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 44-56-59 SO AS TO MAKE FINDINGS AND DECLARATIONS BY THE GENERAL ASSEMBLY WITH RESPECT TO THE DISPOSAL OF HAZARDOUS WASTE IN THIS STATE AND TO AMEND SECTION 44-56-60, AS AMENDED, RELATING TO THE REQUIREMENT FOR OBTAINING AND ISSUING PERMITS FOR HAZARDOUS WASTE TREATMENT, STORAGE, OR DISPOSAL, SO AS TO REQUIRE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO EVALUATE ANNUALLY TECHNOLOGIES AND METHODS TO REDUCE THE VOLUME OF HAZARDOUS WASTE AND REPORT ITS RESULTS TO THE GENERAL ASSEMBLY BEFORE THE FIRST DAY OF FEBRUARY BEGINNING IN 1991, AND TO REDUCE OVER TWO YEARS THE AMOUNT OF HAZARDOUS WASTE THAT MAY BE DISPOSED OF ANNULLY BY BURIAL FROM ONE HUNDRED THIRTY-FIVE THOUSAND TONS TO ONE HUNDRED TEN THOUSAND TONS, TO AUTHORIZE THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO ALLOW LAND DISPOSAL IN EXCESS OF THE ANNUAL LIMIT UPON THE APPROPRIATE CERTIFICATION, TO REQUIRE THE OPERATOR OF A HAZARDOUS WASTE DISPOSAL FACILITY OR SITE TO RESERVE ANNUALLY CAPACITY TO DISPOSE OF SOUTH CAROLINA GENERATED HAZARDOUS WASTE AT LEAST EQUAL TO THE IN-STATE WASTE DISPOSED OF AT THAT SITE OR FACILITY IN THE PREVIOUS YEAR, AND TO PROVIDE EXCEPTIONS, AND TO PROHIBIT THE BURIAL IN A TWELVE-MONTH PERIOD IN THIS STATE OF MORE OUT-OF-STATE GENERATED HAZARDOUS WASTE THAN WAS BURIED IN THE PREVIOUS TWELVE MONTHS.

Be it enacted by the General Assembly of the State of South Carolina:

Findings

SECTION 1. Chapter 56, Title 44 of the 1976 Code is amended by adding:

"Section 44-56-59. (A) General Assembly finds:

(1) The existing commercial land disposal facility in South Carolina and available capacity in this State generally are limited resources;

(2) It is essential that the limited waste treatment and disposal capacity of the existing commercial facility and the State in general be preserved, ready and available to ensure that the needs of South Carolina are met first;

(3) The existing commercial land disposal facility as well as other hazardous waste treatment and disposal facilities must give preference to hazardous waste generators within the State for treatment and disposal of hazardous materials at licensed facilities in the State;

(4) The General Assembly and the Executive Branch have mandated restrictions on the importation of out-of-state wastes and on the capacity of existing hazardous waste landfills; and

(5) Reducing the amount of hazardous waste shipped to South Carolina commercial facilities will send a message to all states that South Carolina intends to reduce to the greatest extent possible the amount of hazardous waste treated and disposed of in this State.

(B) Based upon these findings, the General Assembly declares that:

(1) Landfilling is the least desirable method of managing hazardous waste and, in order to reduce potential risks to human health and the environment, reliance on landfilling must be reduced or eliminated when alternative

disposal methods which are technologically and economically feasible are reasonably available within the State, through regional agreements between states, or through other means; and

(2) As this State reduces its reliance on landfilling through its waste minimization practices and other means, the amount of hazardous waste being shipped into this State for landfilling from locations outside of the State should be reduced and eliminated also."

Hazardous waste

SECTION 2. Section 44-56-60(a) of the 1976 Code is amended to read:

"(a) (1) In order to provide the General Assembly with the information it needs to accomplish the above goals, the Department of Health and Environmental Control shall evaluate annually the effects of new and existing waste management technologies, alternate methods of storage or disposal, recycling, incineration, waste minimization laws and practices, and other factors that tend to reduce the volume of hazardous waste. The results of the department's evaluation must be reported to the General Assembly not later than February first of each year, beginning in 1991, in a form that will permit the General Assembly to determine whether or not hazardous waste landfill capacity in this State should be reduced.

(2) No person may construct, substantially alter, or operate a hazardous waste treatment, storage, or disposal facility or site, nor may a person transport, store, treat, or dispose of hazardous waste without first obtaining a permit from the department for the facility, site, or activity. Beginning July 1, 1990, permitted hazardous waste disposal sites are restricted to a rate of land disposal by burial not to exceed one hundred twenty thousand tons of hazardous waste for the twelve-month period ending July 1, 1991. On July 1, 1991, permitted hazard-

ous waste disposal sites are restricted to a rate of land disposal by burial not to exceed one hundred ten thousand tons of hazardous waste for each twelve-month period thereafter within the permitted area of the site.

(3) During a twelve-month period, the Commissioner may allow land disposal by burial in excess of the limitation, upon certification of the department that:

(A) disposal by land burial from a particular site in South Carolina is necessary to protect the health and safety of the people of this State; or

(B) at least one hundred ten thousand tons of hazardous waste disposed of by land burial in this State during the twelve-month period was generated in South Carolina.

During each twelve-month period, operating a hazardous waste disposal facility or site shall reserve at least the same capacity to dispose of hazardous waste generated in South Carolina that was disposed of by burial at that facility or site during the previous year excluding capacity that was used to dispose of hazardous waste pursuant to subitem (A). No more hazardous waste from out of state shall be buried in South Carolina than was buried in the previous twelve-month period.

Certification must be issued to the party seeking to use land disposal of the waste, and the certification must be presented to the operator of the facility at the time of disposal. The facility shall submit this certification with its regular report to the department of permitted activity at the disposal site."

Time effective

SECTION 3. This act takes effect upon approval by the Governor.

In the Senate House the 7th day of June
In the Year of Our Lord One Thousand Nine Hundred Ninety.

Nick A. Theodore,
President of the Senate

Robert J. Sheheen,
Speaker of the House of Representatives

Approved the 13th day of June, 1990.

Carroll A. Campbell, Jr.,
Governor

with the Union-Newberry County line, thence northeast along said highway to its junction with Broad River, thence south along said river to its junction with the Newberry County line, thence west and north along said county line to the point of beginning.

37. Williamsburg County. The entire county.

B. Suppressive areas. None.

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
CHAPTER 61

Statutory Authority: S.C. Code Ann. 44-56-10 *et seq.*

61-99. Hazardous Waste Management Planning

I. Purpose and Scope:

A) Each State is obligated to certify to the President of the United States that it will have waste disposal capacity sufficient for the next twenty (20) years. Because sites suitable for proper disposal of hazardous waste are limited, applicants for permits to establish or expand hazardous waste management facilities shall demonstrate to the Department the need for such new or expanded facilities in order to:

1. ensure that the needs of South Carolina industries and other necessary users are met, and to prevent dangerous and illegal disposal practices;

2. prevent excess capacity which may become technologically obsolete and/or unnecessary as changes occur in production practices, methods of treatment, utilization of waste materials, and other waste minimization efforts;

3. minimize the burden placed on State resources through activities associated with the permitting, operation, and supervision of such facilities; and

4. minimize potential adverse environmental and publict health effects.

B) This regulation shall apply to applicants for permits to establish or expand facilities for treatment, storage, or disposal of hazardous waste; *provided,* however, that it shall not apply to facilities operated by enterprises for the treatment, storage, or disposal of hazardous waste at the site of generation; and *provided* further, that it shall not apply to facilities which apply to the Department for a permit to continue existing activities with existing limitations pursuant to R.61-79, Part 270.10 (e)(4), (i.e., a "Part B" permit); and *provided* further, that it shall not apply to the hazardous waste management activities at those manufacturing facilities which lawfully burn hazardous waste for energy recovery up to the normal rate of manufacturing production, or who lawfully use or reuse the hazardous waste is a safe and environmentally acceptable substitute for raw materials; and provided further that manufacturing facilities who burn hazardous waste for energy recovery or who use or reuse hazardous waste shall demonstrate that they derive the majority of profits from the product produced.

C) No hazardous waste facilities subject to this regulation shall be permitted until the demonstration of need is approved by the Department.

II. Definitions:

A) "Available capacity" means permitted capacity available at hazardous waste management facilities that will accept off-site generated hazardous waste.

B) "Expand or Expansion" means any increase in the permitted capacity of the facility, any change in the types of waste received by the facility, or any increase in the

volume or rate of waste permitted to be managed by a facility.

C) "Hazardous Waste" means a hazardous waste as defined in R.61-79.261 of the South Carolina Hazardous Waste Management Regulations.

D) "Hazardous Waste Management Facility" means any facility for the treatment, storage, or disposal of hazardous waste as defined in R.61-79.

III. Demonstration of Need Requirements for Hazardous Waste:

A) Each application for a permit to construct a new facility or expand an existing facility shall be accompanied by a demonstration of need, which shall be of such form and content as the Department may specify.

B) The demonstration of need shall be specific for each hazardous waste to be managed at the facility and shall include, but not be limited to:

1. documentation of the remaining available capacity at existing hazardous waste management facilities within the State of South Carolina;

2. documentation of the current volume generated within the state which will require off-site management and an annual projection for each of the next five (5) years, based on reliable data; and

3. a description of any additional factors, such as geographical or physical barriers which may limit transportation, or the existence of additional available capacity outside of the State of South Carolina which may serve the projected need.

C) For purposes of demonstrating need, Hazardous Waste generated outside the State of South Carolina shall not be included.

IV. Appeals:

An appeal from denial of a permit for failure to demonstrate that a need exists shall be deemed a "Contested Case" as defined in S. C. Code Ann. 1-23-310(2).

V. Severability:

Should any section, paragraph, sentence, clause or phrase of this regulation be declared unconstitutional or invalid for any reason, the remainder of this regulation shall not be affected thereby.

EXECUTIVE ORDERS

[Filed Jul. 6, 1989]

EXECUTIVE DEPARTMENT

[State Logo]

State of South Carolina

EXECUTIVE ORDER NO. 89-25

WHEREAS, the State of South Carolina is responsible for promoting and preserving the environment of the State and for protecting the public health and welfare; and

WHEREAS, preservation of the environment and protection of the public health require prevention or abatement of nuisances used by uncontrolled disposal of hazardous waste; and

WHEREAS, for the foreseeable future, generation of hazardous waste is a necessary consequence of industrial activity and the use of consumer goods; and

WHEREAS, all states generate hazardous waste and receive the benefits of the economic activity attendant thereto; and

WHEREAS, prudent management of hazardous waste includes waste minimization, waste reduction, recycling, and alternative forms of disposal, including incineration, chemical treatment, and land disposal; and

WHEREAS, the public health and the quality of the environment is best protected by treating hazardous waste before disposal so as to minimize its hazardous characteristics and to reduce its volume; and

WHEREAS, each treatment or disposal facility creates a burden on the state and locality in which it is situated, in that the state and locality must provide additional resources to support operations of such a facility and will

be subjected to ongoing operations as well as to the residue; and

WHEREAS, based on volume of hazardous material currently being treated or disposed of at facilities located in South Carolina, this State bears a disproportionate fraction of the burden of hazardous waste management; and

WHEREAS, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), requires that each state certify to the President by October 17, 1989, that it will be able to manage hazardous wastes generated within its borders for twenty years; and

WHEREAS, after October 17, 1989, no CERCLA remedial actions can be undertaken unless the state first enters into a contract or cooperative agreement with the Environmental Protection Agency providing such certification; and

WHEREAS, the Environmental Protection Agency has issued guidance to states which specifies what constitutes an acceptable Capacity Assurance Plan, one component of which is a requirement that states which plan to rely on exportation of waste streams as a waste management strategy, obtain assurance from importing states in the form of interstate agreements that waste will be accepted for treatment and disposal; and

WHEREAS, South Carolina is the location of a land disposal facility for hazardous waste, the capacity of which is fixed by S. C. Code Ann. § 44-56-60(a) at 135,000 tons per year; and

WHEREAS, South Carolina is the location of two commercial incinerators which have capacities in excess of the needs of South Carolina generators; and

WHEREAS, S. C. Code Ann. § 44-56-205 (1989) requires that all hazardous waste treatment and disposal

facilities in South Carolina give preference to South Carolina generators; and

WHEREAS, an interstate planning process is necessary to insure the orderly development of treatment and disposal capacity which distributes the burdens proportionally to the benefits; and

WHEREAS, South Carolina has taken part in a regional planning meeting at which proposals for sharing responsibility for development of treatment capacity sufficient to serve the needs of the region were discussed; and

WHEREAS, the existing land disposal facility in South Carolina is a limited resource which may be an essential element in the hazardous waste management plans of many states; and

WHEREAS, planning is essential to insure that waste treatment and disposal capacity will be ready and available to serve the needs of South Carolina and other states in the region.

NOW, THEREF0RE, I do hereby order that effective July 1, 1989, hazardous waste disposal facilities operating in South Carolina shall reserve 54,000 tons per year of the statutory maximum of 135,000 tons per year for South Carolina generated hazardous waste; provided, further, that of the remaining 81,000 tons, a hazardous waste disposal facility may not receive more than 35,000 tons per year from any one state, of which a hazardous waste disposal facility may not receive more than 10,000 tons from any state in any calendar quarter, not to exceed the annual cap of 35,000 tons. And provided, further, that during the twelve calendar months following July 1, 1989, 27,000 tons capacity shall be reserved for disposal of material which is the by-product of waste pretreatment to reduce its hazardous characteristics and its volume; during the subsequent two years, the amount so reserved shall increase by 6,750 tons each year.

If, after the third quarter of any calendar year, and upon demonstration to the S. C. Department of Health and Environmental Control (the "Department") that the capacity so reserved for South Carolina generators will not be required in the remainder of the year, the excess capacity may be offered to other generators. In reviewing such demonstrations, the Department is hereby directed to consider past utilization of the site and anticipated South Carolina needs, including but not limited to waste generated from State and federal Superfund cleanup activities.

Given under my hand and the Great Seal of the State of South Carolina, this 6th day of July, 1989.

/s/ Carroll A. Campbell, Jr.
CARROLL A. CAMPBELL, JR.
Governor

ATTEST:

/s/ John T. Campbell
JOHN T. CAMPBELL
Secretary of State

[Filed Apr. 3, 1989]

EXECUTIVE DEPARTMENT

[State Logo]

STATE OF SOUTH CAROLINA

EXECUTIVE ORDER NO. 89-17

WHEREAS, the State of South Carolina is responsible for promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances from illegal dumping of hazardous waste; and

WHEREAS, South Carolina is promoting waste minimization, waste reduction, recycling, incineration, and chemical treatment as alternatives to land filling; and

WHEREAS, the volume of hazardous waste disposed of in South Carolina is disproportionately out-of-state waste; and

WHEREAS, other states have failed to act responsibly in disposing of their own hazardous waste and have implemented by statute, regulations or administrative action, barriers and restraints against the disposal of hazardous waste within their own borders; and

WHEREAS, other states are not working cooperatively to solve the regional treatment and disposal problems of hazardous waste and should be encouraged to cooperate in a regional approach to hazardous waste treatment and disposal; and

WHEREAS, the citizens of South Carolina are concerned about the hazardous waste burden placed upon South Carolina which threatens our environment and the mental well-being of our citizens; and

WHEREAS, South Carolina has numerous hazardous waste sites on the National Priority list for clean-up with an estimated 800,000 tons of waste requiring remedial action; and

WHEREAS, the State of South Carolina has established a comprehensive Management program for the generation, storage, treatment and disposal of hazardous waste; and

WHEREAS, this program is administered by the South Carolina Department of Health and Environmental Control under authority of the South Carolina Hazardous Waste Management Act under Section 44-56-10 et. seq., *Code of Laws of South Carolina, 1976* (Cum. Supp. 1987); and

WHEREAS, the State of South Carolina was authorized on November 8, 1985, to fully administer its hazardous waste management program; and

WHEREAS, the purpose of this program is to protect the health of the citizens of South Carolina and the environment of the State of South Carolina by providing a "cradle to grave" approach to the management of hazardous waste; and

WHEREAS, in order to assume the safe handling and disposal of hazardous waste, the South Carolina Hazardous Waste Management Act governs all persons who handle such waste including those who create the waste (generators); those who ship waste from its point of origin to elsewhere (transporter) and those who own or operate hazardous waste management facilities (treatment, storage and disposal facilities); and

WHEREAS, it is a requirement on all states under Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA), as amended, to demonstrate by October 17, 1989, that a state has adequate capacity to manage the hazardous

wastes generated by the state and expected to be generated in the state for the next twenty years; and

WHEREAS, after October 17, 1989, no CERCLA remedial actions can be taken in that state unless the state first enters into a contract or cooperative agreement with the Environmental Protection Agency providing such assurances; and

WHEREAS, the Environmental Protection Agency has issued guidance to states which specifies what constitutes an acceptable Capacity Assurance Plan, one component of which is a requirement that states which plan to rely on exportation of waste streams as a waste management strategy, obtain assurance from importing states in the form of interstate agreements that waste will be accepted for treatment and disposal; and

WHEREAS, the State of South Carolina can and will demonstrate adequate capacity to manage the hazardous wastes generated in this state for the prescribed period; and

WHEREAS, it is a requirement of the Resources, Conservation and Recovery Act and the regulations promulgated pursuant thereto, specifically 40 C.F.R. Section 271.4, that states must demonstrate consistency with federal program requirements in order to administer their own hazardous waste management programs; and

WHEREAS, the State of South Carolina has an approved and consistent program for hazardous waste management; and

WHEREAS, any state law or state program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in that state may be deemed to cause that state to have an inconsistent program and lose authority to administer a hazardous waste management program; and

WHEREAS, the State of South Carolina has worked diligently with South Carolina industry to enhance economic development by providing appropriate and environmentally safe storage, treatment and disposal facilities within its borders while certain states have arbitrarily obstructed the treatment, storage or disposal of hazardous waste within their borders inconsistent with federal law; and

WHEREAS, the Environmental Protection Agency has failed to follow their own requirements and withdraw program authority from these states; and

WHEREAS, this failure to act and the failure of certain other states to meet their responsibilities in the management of hazardous waste have caused an unfair burden on the State of South Carolina.

NOW, THEREFORE, I do hereby order that effective March 1, 1989, no person who owns or operates a disposal facility in this state shall accept a hazardous waste which is generated in another state and is banned or prohibited for disposal by any statute, regulation or administrative decision of that state. The State will not enter into any interstate agreements in which South Carolina is to be the importing state with states which do not meet the following criteria:

1) (a) Effective December 31, 1990, any state which does not meet the site designation requirements of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act, for a site or sites within its borders which is or are capable of treating and disposing of hazardous waste generated within its borders;

(b) Between January 1, 1991, and December 31, 1993, such states may be exempted from the ban provided that a permit application for a waste treatment or disposal

facility has been submitted to the appropriate agency and is being pursued;

(c) Effective December 31, 1993, no state shall be exempted from the ban unless such instate facilities shall be operational.

2) In the event that South Carolina enters into an interstate agreement pursuant to EPA guidance with a state which subsequently fails to comply with the requirements of the Capacity Assurance Plan guidance, or fails to comply with one or more of the criteria set forth above, South Carolina will take the appropriate steps to withdraw from the interstate agreement and to notify the Environmental Protection Agency that South Carolina considers the State in question to have violated the Congressional requirements established in CERCLA § 104(c)(9). Under the terms of this Executive Order, waste from generators located in such states will be barred from access to treatment or disposal facilities located in South Carolina.

All hazardous waste treatment and disposal facilities in South Carolina shall give preference to hazardous waste generators within the State of South Carolina for treatment and disposal of hazardous materials at licensed facilities within the State. The State of South Carolina shall meet or exceed the pretreatment and land ban criteria established by the EPA which require all hazardous waste to be pretreated by either chemical treatment, incineration or such other form as necessary to detoxify as far as technically possible all wastes.

The Department of Health and Environmental Control is further instructed to accelerate its cleanup activities at the National Priority listed Superfund sites within South Carolina.

This Executive Order shall be interpreted to encourage a reasonable and cooperative approach toward hazardous

waste management within the southeast region and to encourage affected states and the Environmental Protection Agency to effectuate a comprehensive hazardous waste management program for the region;

The South Carolina Department of Health and Environmental Control is directed to ensure compliance with the provisions of this Order.

This Order rescinds Executive Order No. 89-03, dated January 18, 1989.

Given under my hand and the Great Seal of the State of South Carolina, this 3rd day of April, 1989.

/s/ Carroll A. Campbell, Jr.
CARROLL A. CAMPBELL, JR.
Governor

ATTEST:

/s/ John T. Campbell
JOHN T. CAMPBELL
Secretary of State